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No. 95-____

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In the Supreme Court of the United States

OCTOBER TERM, 1995

PUBLIC UTILITY COMMISSION OF OREGON,

Petitioner,

v.

GTE NORTHWEST INCORPORATED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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QUESTION PRESENTED

Whether the *per se* takings rule of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), applies to a telecommunications utility, which is regulated in all aspects of its ability to use, possess, and otherwise control its utility property, when the government requires a physical occupation of a portion of the utility's reasonably available property so that providers of complementary telecommunications services may interconnect to the essential network.

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PETITION FOR CERTIORARI

Petitioner, the Public Utility Commission of the State of Oregon (PUC), respectfully prays that the Court issue a writ of certiorari to review the judgment and opinion of the Oregon Supreme Court in *GTE Northwest, Inc. v. Public Utility Commission*, 321 Or. 458, 900 P.2d 495 (1995).

OPINIONS BELOW

The opinion of the Oregon Supreme Court is reported as *GTE Northwest, Inc. v. Public Utility Commission*, 321 Or. 458, 900 P.2d 495 (1995), and is attached to this petition as Appendix A. The opinion of the Oregon Court of Appeals is reported as *GTE Northwest, Inc. v. Public Utility Commission*, 130 Or. App. 637, 883 P.2d 255 (1994), and is attached as Appendix B.

JURISDICTION

The Oregon Supreme Court's opinion issued on August 24, 1995. The state court judgment, which is attached as Appendix C, was issued and became effective on October 13, 1995. This petition is filed within 90 days of that date.[1] Jurisdiction to

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[1]Unlike the practice in many jurisdictions, in Oregon the appellate court decision does not serve as the mandate or judgment. Instead, the appellate court judgment consists of the appellate decision together with a final order and seal of the court. Or. Rule of Appellate Proc. 14.05(1). As relevant here, the judgment is entered by the State Court Administrator only after expiration of the time for seeking reconsideration and for petitioning for costs and attorney fees. Or. Rule of Appellate Proc. 14.05(3)(b)(i) and (ii). The judgment is not effective until the Administrator enters it and sends it to the court below. Or. Rule of Appellate Proc. 14.05(2)(a). The 90-day period for filing a petition for writ of certiorari begins to run upon the entry of judgment. 28 U.S.C. § 2101(c) (1994).

Questions about Oregon's judgment practice first arose in *Alaska Airlines v. Department of Revenue*, No. 89-346, where the petition for certiorari was filed more than six months after the date of decision, but within 90 days of the date of entry of the judgment. Each of the parties was requested to state its position on whether the petition was timely. Both the Oregon Attorney General and the petitioner took the position that it was timely. The Court apparently agreed, because the petition was accepted for filing. *See* Supreme Court Rule

(continued...)

review the judgment by writ of certiorari is conferred upon the Court by 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

A. Constitutional Provisions

The Fifth Amendment to the United States Constitution provides, in part:

> * * * nor shall private property be taken for public use, without just compensation.

B. Statutes

Public utilities, including telecommunications utilities, are subject to an extensive series of state statutes regulating the control and disposition of their utility property and the conduct of their telecommunications activities. The statutes most relevant to this case are set forth in Appendix D.

C. Regulations

This case calls into question the constitutionality of administrative regulations promulgated by the Oregon Public Utility Commission that require telecommunication utilities to provide a service entitled "collocation." The full text of the relevant administrative rules is set forth in Appendix E.

Or. Admin. Rule 860-35-110(1) provides:

> [Local Exchange Carriers] shall offer collocation and virtual collocation to customers as provided in this rule.

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[1](...continued)

13.2 (*former* 20.3); the clerk will refuse a petition that is jurisdictionally out of time). The Oregon Attorney General since that time consistently has taken the position that the jurisdictional time for filing a petition for certiorari runs from the date of entry of judgment, not entry of the Oregon Supreme Court's decision.

Or. Admin. Rule 860-35-020(8) provides:

> "Collocation" means a service, offered by a [Local Exchange Carrier (LEC)], which provides for placement and installation of a customer's equipment, software, and databases on LEC premises. Premises include central offices, remote network facilities, or any other similar location owned by the LEC. The equipment, software, and databases are owned by the customer.

STATEMENT

1. Oregon, like all other States and the federal government, extensively regulates and controls the provision of electricity, natural gas, telecommunications, and similar utility services. Entities seeking to provide telecommunication services to Oregon citizens must obtain a "certificate of authority" from the PUC. Or. Rev. Stat. §§ 759.020 - .025. Upon receiving a franchise to operate as a telecommunications utility, the utility is subject to a vast system of regulatory oversight and control in the use, possession, and control of its utility property. For example, the power of telecommunications utilities to issue stocks and bonds, notes and other indebtedness, as well as to create liens on their property situated within the State of Oregon, is deemed "a special privilege, the right of supervision, regulation, restriction and control of which is and shall continue to be vested in the [S]tate." Or. Rev. Stat. § 759.305. Significantly, telecommunications utilities lack unilateral authority over their utility property. Instead, they must seek PUC approval before they may "sell, lease, assign or otherwise dispose" of their utility property (Or. Rev. Stat. § 759.375(1)(a)); before they may mortgage or otherwise encumber their utility property (Or. Rev. Stat. § 759.375(1)(b)); and before they may make any contracts relating to the "construction, operation, maintenance or use" of their utility property (Or. Rev. Stat. § 759.385(1)).

2. The break-up of the national telephone monopoly and the astonishingly rapid advances in communication technology in recent years have dramatically changed the telecommunications industry and the regulatory landscape. As is true in most if not all other States, the regulatory environment in Oregon consists of a blend of monopolistic and openly competitive telecommunications utility services. Oregon's overall policy goal in the telecommunications area is "to secure and maintain high-quality universal telecommunications service at just and reasonable rates for all classes of customers and to encourage innovation within the industry by a balanced program of regulation and competition." Or. Rev. Stat. § 759.015.

The local exchange carriers ("LECs") are the entities that are franchised to provide basic telephone service to individual and business customers. LECs construct, own, or (in a few cases) lease the essential infrastructure necessary to provide telephone service of any kind. That infrastructure consists primarily of the wires that go to homes and businesses, the poles or conduits that carry those wires, and the switching mechanisms that direct calls to their destinations. LECs are distinguished, for example, from interexchange companies that provide long-distance service.[2] As other States do, Oregon grants each LEC a state-created monopoly, or near monopoly, for the provision of basic telephone service within the LEC's service area. Or. Rev. Stat. § 759.500 - .570.

"Enhanced services" are complementary telephone communication services that go beyond the basic transmission and receipt of telephone calls. They consist of more sophisticated

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[2]A telephone call typically originates with a subscriber's telephone and travels to the subscriber's local exchange company over that LEC's wires. The call may begin and end within the same LEC, depending on the range of the LEC's territory, or it may pass through an interexchange company and terminate with a second local exchange company in another locale.

computer processing of the information transmitted over the telephone lines and use of the lines for computer data retrieval. Examples include information retrieval (*e.g.*, access to databases, such as Lexis, Westlaw, Dow Jones), voice messaging, and other technologically advanced signal or computer processing. Unlike basic telephone service, which is provided through a largely monopolistic franchise, enhanced services are provided in a competitive environment, with the consumer able to select among several providers. "Enhanced service providers" (ESPs) compete with the LEC to deliver these complementary services. For ESPs to offer enhanced services, however, they must have access to the monopoly infrastructure network owned or controlled by the LEC.

3. "Open Network Architecture" (ONA) is the term used by the Federal Communications Commission and adopted throughout the United States to describe telecommunications network standards that permit all users of the basic, monopoly infrastructure to interconnect. ONA is designed to introduce competition into the monopoly telephone network to the greatest extent possible and to prevent telephone companies from using their "substantial market power" to "discriminate against competing providers of enhanced services." *See Third Computer Inquiry*, 104 F.C.C.2d 958, 1019 (1986) *rev'd on other grounds and remanded sub nom, People of State of Cal. v. F.C.C.*, 905 F.2d 1217 (9th Cir. 1990). In part, this means that any provider of complementary services (generally termed an LEC "customer") in this new environment will be able to purchase access to the infrastructure on a competitive basis without monopolistic control or pricing.

As part of establishing the ONA environment, the PUC followed the model of the Federal Communications Commission

and mandated "collocation."[3] Physical collocation, established in Oregon by the challenged rules, requires the local provider of basic telephone service (the LEC) to permit an enhanced service provider (an ESP) physically to locate equipment on the LEC's premises so that it may connect to the LEC's network. Or. Admin. Rule 860-35-020(8). Under the rules' terms, an LEC is obligated to provide space for an ESP's equipment only if that space is not otherwise needed by the LEC for providing basic telephone services. Or. Admin. Rule 860-35-110(4)(e) and (4)(f). LECs are to accommodate ESPs on a "first come, first served" basis; any LEC providing its own enhanced services has no special precedence over other requests for collocation. Or. Admin. Rule 860-35-110(4)(d) and (4)(f). LECs may include the costs of collocation in their tariff structure (Or. Admin. Rule 860-35-060) and if accommodating an ESP's request for collocation requires construction or modification of existing space, the LEC may require the ESP to pay reasonable construction costs and special monthly service charges for that space. Or. Admin. Rule 860-35-110(4)(g). Collocation, in effect, gives all ESPs the most cost-efficient and reliable access to the

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[3]The term "collocation" is pronounced "co-location." *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 446 (1993). Typically, collocation may be one of two kinds, physical (also termed "actual") and virtual. Only physical collocation is at issue in this case. Oregon's rules, like the FCC's, also provide for "virtual collocation" as an alternative to the physical collocation at issue here. *See* Or. Admin. Rule 860-35-110; *Bell Atlantic Telephone Companies v. F.C.C.*, 24 F.3d 1441, 1444 (D.C. Cir. 1994) (federal collocation rules). In virtual collocation, the ESP specifies the equipment, software, and databases, but the LEC acquires, owns, and maintains them. *Id.* Because the LEC controls access and maintenance, among other reasons, it is generally agreed that physical collocation better serves the goal of providing ESPs with equal competitive access to the network. *See generally* Larson, Kovacic, and Mudd, *Competitive Access Issues and Telecommunications Regulatory Policy*, 20 J. CONTEMP. L. 422, 431 and nn. 19–20 (1994).

LEC's infrastructure.[4] It also assures that LECs, if they choose to provide enhanced services, do not have an anticompetitive advantage in that regard. *See generally Expanded Interconnection with Local Telephone Company Facilities*, 7 F.C.C. Rcd. 7369, p. 39 (1992), *modified* 8 F.C.C. Rcd. 127 (1993), *rev'd sub nom, Bell Atlantic Telephone Cos. v. F.C.C.*, 24 F.3d 1441 (D.C. Cir. 1994).

4. Respondent GTE Northwest (GTE) has a certificate of authority to operate in Oregon as an LEC, and thus has an exclusive franchise to provide basic telephone services to the subscribers in its territory. Respondent is also a provider of enhanced services and competes with others to market those services to its subscribers.

Respondent brought a challenge to the PUC's collocation rules in the Oregon Court of Appeals under Or. Rev. Stat. § 183.400(3). Respondent challenged the rules as facially invalid on two related theories. First, respondent argued that the collocation requirement effects a "taking" of property within the

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[4]LECs are not obligated to provide enhanced services, but they commonly do so. ONA in fact was mandated by the FCC because the FCC removed the so-called "structural" limitations on LECs that prevented them from directly providing enhanced services and required them instead to form subsidiary companies for that purpose. *See generally MCI Telecommunications Corp. v. F.C.C.*, 57 F.3d 1136, 1139 (D.C. Cir. 1995). Collocation, as part of the ONA effort, was designed to alleviate the anticompetitive effects of having LECs directly provide enhanced services. If LECs may locate the equipment for those services on network facilities, while not permitting competitors to do the same, they acquire a significant advantage in terms of cost and reliability of the service. Others offering enhanced services are forced to locate their equipment at "the end of the wire" with the result that they are more susceptible to service interruptions, to unregulated rent costs for the space that their equipment occupies, to higher costs for moving their signals a greater distance, and to similar competitive disadvantages. The ultimate consequence is that the LEC tends to have a monopolistic hold not only on the provision of basic telephone services, where its exclusive franchise is legitimate, but also on the enhanced services that are supposed to be open to competition on equal terms. *See generally ibid.*

meaning of the Takings Clauses of the state and federal constitutions. In support of that argument, respondent relied exclusively on the *per se* takings analysis announced in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Specifically, respondent argued that collocation is a forced, permanent physical occupation of its property and, as such, is a "taking" without regard to the public interests it serves. Second, respondent argued that as a state law matter, an administrative agency must have an express delegation of eminent domain power in order to promulgate a regulation that "takes" property in the constitutional sense. Respondent argued that in the absence of eminent domain authority, the collocation requirement (even though it results in compensation to the utility) must be invalidated.

The Court of Appeals rejected respondent's argument under *Loretto*, reasoning *inter alia* that the regulatory environment for telecommunications utilities is such that "the exercise of the PUC's authority to control the use of an LEC's property under its rules does not offend the traditional rights to possess property and to exclude others from the use of it." *GTE Northwest, Inc. v. Public Utility Commission*, 130 Or. App., at 645. Given that conclusion, the intermediate appellate court found it unnecessary to reach respondent's other arguments.

5. Respondent successfully petitioned the Oregon Supreme Court for discretionary review. On review, the State's highest court concluded first that, under state law, an administrative agency must have an express grant of eminent domain authority in order validly to effect a "taking," even one that is compensated, through a regulatory enactment. *GTE Northwest, Inc. v.*

Public Utility Commission, 321 Or., at 466-68.[5] The state court then analyzed whether the collocation requirement does in fact effect a facial "taking." The court concluded under the Fifth Amendment that it does.[6]

The Oregon Supreme Court viewed *Loretto* as declaring a *per se* rule that essentially admits of no exceptions. The court understood *Loretto* to hold that "[i]f the nature of the governmental intrusion amounts to a 'permanent physical occupation of property,' the inquiry ends * * *." *Id.*, at 469. Because LECs are *compelled* to suffer physical occupation of a part of their property by a third party, the collocation requirement is a taking *per se*. *Id.*, at 473. The court held that the intensively regulated nature of the telecommunications utility industry was not relevant to the analysis, reasoning:

> [T]he facts that an industry is heavily regulated, and that a property owner acquired the property knowing that it is heavily regulated, do not diminish a physical invasion to

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[5]The PUC argued that the requirement of an express delegation of eminent domain authority is satisfied where the legislature has, first, authorized the regulatory action taken and, second, authorized compensation from some source (*i.e.*, through the rate-making process) for that encroachment on the property owner. The Oregon Supreme Court disagreed and concluded that if the collocation rules in fact effect a taking, the legislative grant must be expressed in terms of eminent domain authority. As much as the PUC may disagree with the state court's approach to the question, it does agree that this portion of the lower court's reasoning is founded strictly on state law principles and does not itself present any federal question. That leaves, however, the question whether the collocation requirement in fact results in a "taking" under the federal constitution. That is the only issue on which petitioner seeks review.

[6]Although respondent also cited the state constitution, it offered no separate state constitutional analysis. The Oregon Supreme Court assumed, without deciding, that the analysis under the state constitution would be the same as under the federal. *GTE Northwest, Inc. v. Public Utility Commission*, 321 Or., at 468, n. 6. It analyzed the issue solely under this Court's Fifth Amendment precedents. *Id.*, at 468–77. Under these circumstances, the federal question is properly presented. *See Michigan v. Long*, 463 U.S. 1032, 1044 (1983).

> something less than a taking. Additionally, the fact that government itself regulates the industry, and therefore invades some of the property owner's traditional property rights, does not permit the government to allow a physical invasion by a third party.

Id., at 474.

The Oregon Supreme Court also rejected the PUC's argument under *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PUC argued that it could require a telecommunications utility to submit to a physical invasion of its property as a condition of its use of the property for its own enhanced services. The court assumed, for purposes of the analysis, that the PUC in fact could prohibit LECs from placing their own enhanced service equipment in their basic service plants. *Id.*, at 475, n. 8. The Oregon Supreme Court considered that fact to be simply inapposite:

> The PUC errs by seeking to apply *Nollan's* "regulatory takings" analysis to a "physical invasion" case. The two are quite different. * * *
>
> The present case involves the state's direction to the owner to permit placement of a third party's property on the property of the landowner. The Supreme Court's takings cases clearly distinguish between physical invasions and regulations; the PUC cites the inapplicable line of regulation-related cases.

Id., at 476–77.

The Oregon Supreme Court therefore concluded that because the challenged collocation rules effect a facial taking, and because the PUC lacks express eminent domain authority, the PUC exceeded its authority in promulgating the collocation requirement. The court therefore declared the rules invalid. *Id.*, at 477.

REASONS FOR GRANTING THE WRIT

The Oregon Supreme Court in this case, following what it understood to be the dictates of *Loretto v. Teleprompter Manhattan CATV Corp.*, announced a *per se* takings rule that encroaches significantly on legitimate governmental regulation of public utilities. In so holding, the Oregon Supreme Court may have been faithful to the literal language of the decision in *Loretto*, but it was not faithful to the constitutional principle at stake. The state court unnecessarily treated *Loretto* as foreclosing the question that this Court specifically reserved in *F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 251, n. 6 (1987). In its seeming allegiance to *Loretto*, the court neglected to examine the underpinnings of that decision or the aspects of public utility franchises that meaningfully distinguish them from purely private property. Moreover, the court declined to take guidance from other decisions of this Court that have significant bearing in this context. The Oregon Supreme Court's decision is at odds with the reasoning of the Federal Circuit Court of Appeal in an analogous context, and it presents a question of significant, recurring interest for the States and federal government in the regulation of the telecommunications industry nationwide.

1. The Oregon Supreme Court's reading of *Loretto* was straightforward, but misguided. The court understood *Loretto* to hold that any compelled physical occupation of private property by government, or by a third party authorized by government to occupy that property, is a "taking" within the meaning of the Takings Clause of the Fifth Amendment. To be sure, the *Loretto* opinion contains ample language to suggest exactly that absolute rule. But *Loretto* properly does not extend to the unique area of public utility property. *Loretto* involved a purely private property owner, and the rationale for its *per se* rule is tied to traditional understandings of private property rights.

Loretto involved a challenge to a New York statute that required private landlords to permit installation of cable television equipment on their property at a government-fixed rate. In concluding that the statute resulted in a Fifth Amendment taking of property, the Court held that "a permanent physical occupation authorized by [the] government is a taking without regard to the public interests it may serve," and "without regard to other factors that a court might ordinarily examine." *Id.*, at 426, 432. In so holding, the Court observed that a permanent physical occupation is a government action of a "unique" and "unusually serious" character. *Id.*, at 426, 432. Such an invasion destroys the property rights that traditionally vest in title—*i.e.*, the rights "to possess, use and dispose" of the property. *Id.*, at 436. The fact that *Loretto*'s holding is tied to the ordinary understandings governing the private ownership of property was implicit in the rationale that drove the decision and was emphasized in the final portion of the opinion:

> Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a *historically rooted* expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation.

Id., at 441 (emphasis added).

2. Neither logic nor constitutional principle supports an extension of *Loretto*'s *per se* takings rule to the public utility context. Utilities, although owned and operated by private investors, are "public monopolies dealing in an essential service" and their "assets are employed in the public interest." *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 315 (1989). *See generally* J. BONBRIGHT, PRINCIPLES OF PUBLIC UTILITY RATES 3–7 (1961). Because competition in the field is either limited or non-existent,

public utilities are extensively regulated. *F.C.C. v. RCA Communications, Inc.*, 346 U.S. 86, 92 (1953). Their utility property is, by definition, conscripted to the public service for the public's beneficial use. *See generally Garelick v. Sullivan*, 987 F.2d 913 (2d Cir.), *cert. denied*, 114 S. Ct. 78 (1993) (public utilities generally are compelled to use their property to serve the public); *South Eastern Indiana Natural Gas Co., Inc. v. Ingram*, 617 N.E. 2d 943, 951–52 (Ind. App. 1993) (utilities owe the public the beneficial use of their property and of the privileges and advantages that accrue to them as utilities).

The statutory constraints placed by Oregon on public utilities in their use of their utility property are extensive. With respect to telecommunication utilities specifically, a utility cannot sell or otherwise dispose of assets used to serve the public without obtaining the PUC's approval. Or. Rev. Stat. § 759.375; *see Pacific Northwest Bell Telephone Co. v. Katz*, 121 Or. App. 48, 53, 853 P.2d 1346, *rev. denied*, 318 Or. 25 (1993). The PUC controls with whom utilities may contract to construct, operate, maintain, or use utility property, and with whom the utilities may contract to finance, rent, lease, or purchase materials, property, or supplies. Or. Rev. Stat. § 759.385(1). Similarly, a utility may not sell, lease, assign, mortgage or otherwise encumber its utility property without PUC approval. Or. Rev. Stat. § 759.375(1)(a) and (1)(b). Nor may a telecommunications utility merge or consolidate, directly or indirectly, its lines, plant, system or any other form of utility property without PUC's express approval. Or. Rev. Stat. § 759.375(1)(c).

Of particular importance, the PUC has the ability to ensure that utility property is used to the public's benefit. Telecommunications utilities therefore may be compelled to extend their service into areas that are not otherwise served. Or. Rev. Stat. § 759.580. In meeting that obligation, they necessarily must dedicate the required resources and physical property, including

whatever plant and equipment is needed. Finally, PUC has the authority to exercise general oversight over utility property. For example, the PUC may enter any premises or facilities occupied by any public utility to make any inspection, examination or test reasonably required to carry out its statutory duties. Or. Rev. Stat. § 765.075. And the PUC may "set up and use upon such premises * * * any apparatus and appliances and occupy reasonable space therefor." These and similar controls on the use and possession of telecommunications utility property are typical of those in place on public utilities throughout the country. *See, e.g., MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1108 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983) (public utilities generally are under an explicit statutory obligation to anticipate and meet all reasonable public demands for their service).[7]

As this Court appropriately has cautioned, the "partly public, partly private status of utility property creates its own set of questions under the Takings Clause of the Fifth Amendment." *Duquesne Light*, 488 U.S., at 307. In effect, in exchange for a monopolistic franchise, the government exacts from utilities the exclusive right to direct and control the use and possession of their utility property.[8] Public utilities thus bear little legal

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[7] *See Democratic Cent. Comm. of D.C. v. Washington M. A. T. Com'n.*, 485 F.2d 786, 804 (D.C. Cir. 1973), *cert denied*, 415 U.S. 935 (1974) (utilities may be required to use a portion of the proceeds of the sale of utility property to reduce their rates, thereby forcing them to share their gains with their customers); *See also* Pond, *The Law Governing the Fixing of Public Utility Rates: A Response to Recent Judicial and Academic Misconceptions*, 41 ADMIN. L. REV. 1, 5 (1989) (not only may utilities not discontinue unprofitable services, they often are required to expand their facilities and services to meet demand even where it is not cost-effective to do so).

[8] Throughout this brief, we refer specifically to "utility property" (*i.e.*, property used and usable in providing utility service) as distinct from other property that a utility may own. Not all property owned by a utility is "in the

(continued...)

resemblance to private property owners and, for Fifth Amendment purposes, they stand in different shoes. The underpinnings for *Loretto*'s holding simply are not present in this context.

3. This Court therefore has not assumed that *Loretto* applies to public utilities. In the only case in which the issue has arisen, the Court found *Loretto* to be inapplicable due to factual differences in the two cases. *F.C.C. v. Florida Power Corp.*, 480 U.S. at 250–52. More specifically, the question in that case was whether the federal Pole Attachments Act resulted in a "taking" of electric utility property under the terms dictated for the lease to cable television companies of space on utility poles. The Court found that *Loretto* had "no application to the facts" presented. *Id.*, 480 U.S., at 250. The act did not require utilities to enter into or continue pole attachment agreements, and thus it did not *compel* a physical occupation. Instead, it only regulated the terms of those agreements if the utilities chose to lease the space. *Id.*, 480 U.S., 251–52. Significantly, the Court did not assume or hold that, but for that factual difference, *Loretto* would apply. To the contrary, the Court reserved the question: "We do not decide today what the application of [*Loretto*] would be if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements. *Id.*, at 251, n. 6.

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[5](...continued)

stream of public service rendered by the utility"; insofar as it is not, it is private property and the utility has the same interests in it as would any non-utility property owner. *See generally* Moritz, *Pacific Gas & Electric Co. v. California Public Utilities Commission: Property in an Envelope*, 49 U. PITT. L. REV. 229, 258 (1987). "For example, a natural gas utility may also engage in the business of gas appliance sales. The property related to the appliance sales enterprise has the same status as the private property held by any competing appliances sales firm." *Id.*, at 252.

a. By treating *Loretto* as controlling, the Oregon Supreme Court permitted *Loretto*'s discrete holding to trump its rationale, and it treated as foregone the question that the Court specifically reserved in *Florida Power*. In doing so, the Oregon Supreme Court too quickly discounted the more meaningful guidance available in the larger body of this Court's Takings Clause cases. Most significant among the relevant cases are those in which the Court has examined claims regarding utility rate-setting. The analysis there has focused on the unique nature of utility property interests and the protection the Fifth Amendment extends to those interests, thus suggesting the more apt analysis here.

On several occasions, the Court has been asked by public utilities to hold that the rates set by regulatory bodies are "confiscatory" and violate the Takings Clause. *E.g.*, *Duquesne Light Co.*, *supra*; *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Comm'n*, 262 U.S. 276 (1923). The decision in *Duquesne Light Co.* traces and synthesizes the jurisprudence in that area. The "guiding principle" for claims of confiscatory utility rate-setting has been that to satisfy the Takings Clause, rates may not be so low that they destroy the value of the utility's property in terms of the utility's net return on its investment. *Duquesne Light Co.*, 488 U.S., at 307–08. As Justice Brandeis explained in his landmark dissent in *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Comm'n*, "the thing devoted by the investor to the public use is not specific property, tangible and intangible, but capital embarked in the enterprise." 262 U.S., at 290. In *Duquesne Light Co.*, the Court endorsed that view and paraphrased Justice Brandeis, stating: "[W]hat [is] 'taken' by public utility regulation is not specific physical assets, but the capital prudently devoted to the public utility enterprise by the utilities' owners." *Duquesne Light Co.*, 488 U.S., at 309.

The Oregon Supreme Court's holding severely erodes that principle by, in effect, mandating an asset-specific examination of valuation and compensation whenever provision of utility service involves "physical occupation" of a utility's property. The court effectively singles out a small portion of the utility's property and treats it as separately protected by the Takings Clause. But there is no principled basis to treat collocation differently in that respect from any other extension of service a utility is forced to provide. Essential to the delivery of almost every utility service is "connectivity," which ultimately involves a forcible encroachment on the utility's "use, possession, and control" if its property, and ultimately involves physical occupation of some amount of utility property by a third party consumer.

For example, when a regulator requires a telecommunications provider to extend service to the customers in a particular locale, utility property is necessarily conscripted to that service. Land may have to be condemned, poles or conduits placed, and wire run to the locale. At some point, an actual physical connection will have to be made between the utility's property (the wire) and the property of a stranger to the utility (the customer's telephone). The space occupied at the end of the wire, albeit small, would be property protected by the Takings Clause were it in the hands of a private person or entity. *Loretto*, 458 U.S., at 438, n. 16 (constitutional protection of property does not turn on whether it is "bigger than a breadbox"). The compelled connection of the customer's telephone is a permanent physical occupation of the utility's wire, but not one that has ever been characterized as a separately protected property interest for purposes of the Fifth Amendment Takings Clause.

Collocation requirements involve only a difference of degree from every other interconnection routinely required of a public utility; they do not make for a difference of kind. *Loretto*, 458

U. S., at 437–38 (extent of occupation of private property is relevant only to amount of compensation, not to fact of compensability). "Physical collocation" merely ensures that an LEC will provide needed service to a customer (an ESP), who will then be able to provide its own complementary telecommunications services.[9] Collocation differs from other connection services that LECs must provide only, if at all, in terms of the amount of property the utility must devote to providing the connection.[10]

The Oregon court's analysis, which treats the physical plant devoted to an ESP's connectivity equipment as a discrete property interest subject to separate protection by the Fifth Amendment, is simply irreconcilable with *Duquesne Light Co.* and the Court's related jurisprudence. It fundamentally contradicts the conclusion that the "Constitution protects the utility from the *net effect* of the rate order on its property," *id.*, at 314 (emphasis supplied) and that if the utility has the opportunity to earn a fair rate of return on its prudently invested capital, the Takings Clause is satisfied. *Id.*, at 310. In effect,

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[9]As one commentator describes at length, "enhanced service providers" are simply customers of the basic local telephone carriers (LECs). ESPs must have access to the basic network infrastructure in order to provide their services. "Collocation" requirements are a way of ensuring optimum access to a customer in need of the LEC's services. To be sure, because LECs have a monopoly only on basic service, and because they generally desire to compete to provide enhanced services as well, to require them to "collocate" requires that they provide service to their own competitors. *See* Baynes, *How Much Is the Toll to Access the Information Superhighway?* 62 Tenn. L. Rev. 141, 149 (1994). But LECs should not be heard complain; their monopoly franchise extends only to basic telephone services. Where enhanced services are concerned, they are simply another of several competitors and another of several customers of their basic service.

[10]Professor Baynes describes collocation requirements as typically requiring about 100 square feet (*i.e.*, a space of 10 feet by 10 feet) in the central offices of an LEC. *Id.*, at 147, n. 24.

what this Court joined together, the Oregon court has squarely put asunder.

b. It is equally difficult to reconcile the Oregon Supreme Court's holding with the essential rationale of *Yee v. City of Escondido*, 503 U.S. 519 (1992). In *Yee*, owners of a mobile home park relied on *Loretto* to challenge rent-control and other ordinances that had the combined effect of giving mobile home renters an indefinite right physically to occupy the rented premises at a sub-market rent. This Court rejected the park owners' challenge, observing that they voluntarily entered the mobile home park business and had invited tenants onto the property. *Id.*, at 527–28. Nothing precluded the mobile park owners from changing the use of their property and evicting their tenants, although by ordinance they were required to give tenants six to 12 months notice before that change could take effect. *Ibid.* The Court held that *Loretto*'s *per se* taking rule did not apply where the physical occupation by third parties was an inherent part of the business into which the property owners had voluntarily entered and which they could voluntarily leave.

Public utilities also voluntarily enter their business of providing an essential public service. In the case of LECs in the telecommunications industry, their basic business is providing "connectivity" to the essential network infrastructure. In the same way that the mobile home owners in *Yee* invite their tenants physically to occupy mobile home space, an LEC invites third parties physically to connect to the basic local network. That invitation inevitably requires some form of physical occupation and use of the utility's property by third parties. The nature of the property occupied and the extent of occupation may vary by the needs of the customer, but accommodating those needs is the essential business in which the LEC is engaged. To be sure, a telecommunications utility may not unilaterally change its business, sell its utility property, and remove itself from the

industry, although it may do so with the government's approval of the terms. That limitation, however, is part of the essential front-end bargain that public utilities make in exchange for their monopolistic franchise to provide a service clothed with the public interest.

c. Finally, the Court's decisions in *Dolan v. City of Tigard*, 512 U.S. ___, 114 S. Ct. 2309 (1994), and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), while not involving public utilities, provide valuable guidance on the issue presented here. Those decisions stand for the proposition that where government has the power to forbid a particular use of property without effecting a taking, it may, in exchange for permitting that use, require the owner to tolerate physical occupation of a portion of the property. The test is whether there is a sufficiently logical and roughly proportional nexus between the governmental regulatory purpose and the required exaction. *Dolan*, 114 S. Ct., at 2319; *Nollan*, 483 U.S., at 837. Stated another way, if the government has the power to forbid a use of property without thereby taking it, the government may condition that use upon permitting a permanent physical occupation of the property that accomplishes the same purpose. There is no taking under the Fifth Amendment.

The same principle logically extends to the regulation involved in this case. Although the Oregon Supreme Court did not have to decide the point, it was willing to assume that, to avoid giving LECs an anticompetitive advantage in the provision of enhanced services, the State could forbid LECs from locating their own enhanced service equipment on the premises devoted to providing basic telephone services. *GTE Northwest, Inc.*, 321 Or., at 475, n. 8. The collocation regulations are simply a logical and proportional alternative to that outright ban. Instead of forcing all ESPs (including LECs in their capacity as enhanced service providers) to attach their equipment at the "end of the

wire," all ESPs (LECs included) have an equal opportunity to locate their connection equipment in the LEC's central plant, thus ensuring the lowest cost and most efficient and reliable service to consumers.

The Oregon Supreme Court dismissed *Nollan* and *Dolan*, declaring that they were "regulatory takings" rather than "physical invasion" cases. *GTE Northwest, Inc.*, 321 Or., at 476. Yet in both *Nollan* and *Dolan*, the Court approved (had the requisite nexus been shown) exactions that clearly amounted to "physical invasions"—in *Nollan*, a public view easement, and in *Dolan*, the dedication of land for a public bike path and for a flood plain. The Oregon Supreme Court's perceived distinction is perplexing at best, and seems to turn on arbitrary labeling rather than on a distinction of substance.

4. By treating the issue presented as controlled by *Loretto*, the Oregon Supreme Court's decision conflicts, at least in fundamental principle, with the decisions of the Federal Circuit Court of Appeals in a closely analogous setting.[11] The Oregon Supreme Court declared flatly that the regulated nature of the telecommunications industry is irrelevant to the analysis. *GTE Northwest, Inc.*, 321 Or., at 474. In the state court's view, if the government compels a permanent physical occupation of property, *Loretto* demands that the action be deemed a taking, irrespective of the historically rooted property rights and expectations of the particular class of property owner or property. The Oregon Supreme Court does not stand completely alone in its view. One federal circuit has taken the same approach in analyzing the federal "collocation" requirement, using the

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[11] Among the federal circuits, the Federal Circuit Court of Appeals resolves "takings" questions with particular frequency, because takings claims, when the amount in controversy exceeds $10,000, are specially within that circuit's jurisdiction. 28 U.S.C. § 1491(a)(1) (Tucker Act).

same incomplete and unsatisfactory reasoning. *Bell Atlantic Telephone Companies v. F.C.C.*, 24 F.3d 1441 (D.C. Cir. 1994).

The Federal Circuit Court of Appeals, however, has reached the precise opposite conclusion in examining permanent physical occupations in the intensively regulated area of the savings and loan industry. One of the lead decisions in the area, *California Housing Securities, Inc. v. U.S.*, 959 F.2d 955 (Fed. Cir. 1992), *cert. denied*, 113 S. Ct. 324 (1992), illustrates the sharp divergence in analysis. There, the court considered whether the physical occupation and takeover of a savings and loan institution by a federal conservator, without any compensation to the entity or the company that owned it, constituted a "taking." It held that it did not.

In its opinion, the court acknowledged that a property owner's right of exclusive use and possession "is one of the most treasured strands in an owner's bundle of property rights." *Id.*, at 958 (citing *Loretto*). The court noted, however, that the savings and loan voluntarily submitted to "an expansive statutory regulatory system" and that "banking is one of the longest regulated and most closely supervised of public callings." *Id.*, at 958. After reviewing recent developments in the regulation of savings and loans, including ones that occurred after plaintiff California Housing Securities (CHS) purchased Saratoga, the savings and loan at issue, the court concluded that "CHS and Saratoga were certainly on notice that Saratoga might be subjected to different regulatory burdens over time." *Id.*, at 959. The court held: "*Loretto* simply does not fit cases such as this where the historically rooted expectations of ownership that underlie the *Loretto* decision do not exist." *Id.*, at 959-60. The court also quoted with approval the holding of the Court of Claims in the case involving the seizure of the Lincoln Savings and Loan Association:

> The *Loretto per se* approach should not facilely be extended in cases where the historically rooted expectations that underlie the *Loretto* decision do not remotely apply. The instant case involves a regulatory action in a highly regulated industry in which the government took actions that reasonably should have been expected by plaintiffs and Lincoln.

American Continental Corp. v. United States, 22 Cl. Ct. 692, 701 (1991) (cited at 959 F.2d, at 960). *Accord Golden Pacific Bancorp v. U.S.*, 15 F.3d 1066, *reh. denied*, (Fed. Cir. 1994).

The Oregon Supreme Court's approach in this case and the Federal circuit's approach in the savings and loan cases are squarely at odds; they cannot both be sound. If the Oregon Supreme Court is correct, then the federal court properly should have concluded in the savings and loan cases that no matter what the "historically rooted" expectations of the banking industry, and despite the fact that the industry is among the most pervasively regulated of all public callings, the physical seizure of the failed savings and loans amounted to a taking *per se* under *Loretto*. Alternatively, if the federal court is correct, at a minimum the intensely regulated nature of the public utility industry and the "historically rooted" interests in public utility property is *relevant* to the takings analysis, contrary to the Oregon Supreme Court's confident and categorical declaration to the contrary. The two approaches form an analytical impasse, one that only this Court can resolve. *See also Bell Atlantic Telephone Companies v. F.C.C.*, 24 F.3d, at 1445.[12]

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[12]The analytical conflict is more difficult to pinpoint in *Bell Atlantic* because there, the federal court assumed the application of *Loretto's per se* rule to collocation requirements without explicitly rejecting the significance of the regulatory environment. At least in its result, however, *Bell Atlantic* is equally in conflict with the savings and loan cases.

5. As one federal court has observed, the telecommunications industry occupies "a unique place in the American industrial scene." *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1110 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). For decades, telecommunications regulation has involved "a blend of private forces and public intervention" to accommodate the peculiarities of the industry to the demands of the public interest. *F.C.C. v. RCA Communications, Inc.*, 346 U.S., at 1004. For much of its history, the massive telephone infrastructure has been controlled through largely monopolistic but highly regulated forces. *See generally People of State of Cal. v. F.C.C.*, 4 F.3d 1505, 1507 (9th Cir. 1993). That structure was originally tolerated based on the political and regulatory judgment that monopoly provision of basic service best served the interests of reliable, effective, and economic telecommunications. *MCI Communications Co.*, 708 F.2d, at 1110. In recent years, that judgment has been "drastically modified, and competition—with all its economic, political and social consequences—is transforming the telecommunications industry." *Ibid.*

Whether state and federal regulatory authorities may require public utilities physically to accommodate other service providers in need of utility interconnections, without every such accommodation being deemed a Fifth Amendment "taking" *per se* under *Loretto*, is a question of substantial and recurring importance. The question transcends the area of telecommunications and extends to the essential services provided by utilities of all kinds, including natural gas, electricity, and (at least through much of this century) railroads.[13] In the area of

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[13]Indeed, public utilities may in some settings have such a hold on essential infrastructure that even if government regulators do not mandate physical access to other enterprises, access may be dictated by antitrust policies. *E.g.*, *Otter Tail Power Co. v. U.S.*, 410 U.S. 366 (1973) (regulated electrical utility

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telecommunications, however, the question of compelled competitive access is of immediate importance.[14] Oregon, together with several other States and the federal government,[15] has adopted collocation requirements in an effort to respond to the extraordinary changes in the telecommunications industry and the need for competitive access if the public's interests are to be well served. The Oregon Supreme Court's decision in this case, and the federal circuit decision in *Bell Atlantic*, inevitably will chill the regulatory environment in this critical context.[16] This Court's review would settle the question reserved in *F.C.C. v. Florida Power Corp.* and would provide needed clarity on

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[13](...continued)

could not refuse to sell power wholesale or to transmit it retail to municipalities that provide for their own electrical distribution); *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1982) (AT&T unlawfully refused to interconnect MCI long distance services to the local telephone network).

[14]*See generally* Larson, Kovacic, and Mudd, *Competitive Access Issues and Telecommunications Regulatory Policy*, 20 J. CONTEMP. L. 419, 422-34 (1994) (discussing competitive access issues generally and describing collocation as "among the most significant issues in telecommunications policy" today).

[15]Because such requirements are often adopted by rule, rather than by statute, it has been difficult to determine for purposes of this petition precisely which States thus far have collocation requirements in effect. As one source describes, however, the F.C.C. and the State of New York have been in the forefront of the collocation issue and many other States have considered or are considering collocation requirements. Baynes, *The On-Ramp to the Information Superhighway: A Case Study of the New York Collocation and Telecommunications Policy*, 7 DEPAUL BUS. L. J. 1, 16 (1994).

[16]Takings challenges under *Loretto* have expanded to state and federal virtual collocation rules. *See* n. 3, *supra*, (discussing "virtual" collocation). The FCC's virtual collocation rules are now in litigation on the same theory presented in this case—that is, they have been challenged on the ground that they effect a *per se* taking under *Loretto*. The issue is currently under advisement in *Pacific Bell et al. v. Federal Communications Comm'n et al.*, United States District of Columbia, No. 94-1547) (D.C. Cir., argued Oct. 17, 1995), where it will be decided by the same court that ruled against the FCC in *Bell Atlantic*.

Loretto's application outside of the area of purely private property rights.

CONCLUSION

The Court should grant the petition and issue a writ of certiorari to review the judgment and opinion of the Oregon Supreme Court.

Respectfully submitted,

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January 11, 1996

APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF OREGON

GTE NORTHWEST INCORPORATED,
Petitioner on Review,
v.
PUBLIC UTILITY COMMISSION
OF OREGON,
Respondent on Review,
and
MCI TELECOMMUNICATIONS
CORPORATION,
Intervenor-Respondent.
(PUC 98-852; CA A81647; SC S41791)

In Banc

On review from the Court of Appeals.*

Argued and submitted March 8, 1995.

Richard E. Potter, Everett, Washington, argued the cause for petitioner on review. With him on the petition were Timothy J. O'Connell, Everett, Washington, and James M. Brown, of Enfield, Guimond, Brown & Collins, Salem.

Robert M. Atkinson, Assistant Attorney General, Salem, argued the cause for respondent on review. With him on the brief were Theodore R. Kulongoski, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

Charles L. Best, Portland, filed a brief on behalf of *amicus curiae* U.S. West Communications, Inc.

Barbee B. Lyon and Michael M. Morgan, of Tonkon, Torp, Galen, Marmaduke & Booth, Portland, filed a brief on behalf of *amicus curiae* Oregon Independent Telephone Association.

Robert W. Childress, Portland, filed a memorandum on behalf of *amicus curiae* Portland General Electric Company.

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* Judicial review of administrative rules of the Public Utility Commission. 130 Or App 637, 883 P2d 255 (1994).

GRABER, J.

GTE Northwest, Inc., (GTE) challenges, under ORS 183.400,[1] certain rules adopted by the Public Utility Commission (PUC). For the following reasons, we hold that the challenged rules are invalid.

I. FACTS AND PROCEDURAL BACKGROUND

In June 1993, the PUC adopted rules that created a regulatory framework for telecommunications, known as the Open Network Architecture (ONA). Those rules have been codified at OAR chapter 860, division 35.

As pertinent here, the ONA relates to two types of competitors in the telecommunications market—local exchange carriers (LECs) and enhanced service providers (ESPs). A single entity may be both an LEC and an ESP, depending on the services that it provides. *See* OAR 860-35-020(14) (defining ESPs). LECs provide basic telecommunications services within geographic boundaries established by the PUC. *See id.* at § (18) (defining LECs). "Basic services" are those services that "provide[] transmission capacity for the movement of information"; they

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[1] ORS 183.400 provides in part:

"(1) The validity of any rule may be determined upon a petition by any person to the Court of Appeals in the manner provided for review of orders in contested cases. The court shall have jurisdiction to review the validity of the rule whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question, but not when the petitioner is a party to an order or a contested case in which the validity of the rule may be determined by a court.

"* * * * *

"(4) The court shall declare the rule invalid only if it finds that the rule:

"(a) Violates constitutional provisions;

"(b) Exceeds the statutory authority of the agency; or

"(c) Was adopted without compliance with applicable rulemaking procedures."

include "data processing, computer memory or storage, switching techniques and other activities which facilitate the movement of information." *Id.* at § (4). ESPs provide "enhanced services." *Id.* at § (14). "Enhanced services" are those services that "employ[] computer processing applications that act on the format, content, code, protocol or similar aspects of the customer's transmitted information," provide customers with "additional, different, or restructured information," or "involve customer interaction with stored information." *Id.* at § (13). Enhanced services include "voice messaging" and "protocol translation between customer equipment or software." *Ibid.* ESPs provide only enhanced services and must utilize LECs' networks to do so. *Id.* at § (14). GTE is an LEC.

GTE objects to portions of the ONA that provide for "collocation." OAR 860-35-020(8) provides:

> "'Collocation' means a service, offered by a[n] LEC, which provides for placement and installation of a customer's equipment, software, and databases on LEC premises. Premises include central offices, remote network facilities, or any other similar location owned by the LEC. The equipment, software, and databases are owned by the customer."

In particular, GTE challenges the validity of OAR 860-35-020(8), OAR 860-35-070(5), and OAR 860-35-110 (the last two of which are set out in the appendix, in pertinent part). That aspect of the regulatory scheme of the ONA is complex but, for our purposes, may be summarized as follows.

The ONA requires an LEC to allow an ESP that complies with certain delineated procedures either to "collocate" or to

"virtually collocate" on an LEC's property.[2] OAR 860-35-070(5); OAR 860-35-110(1). If an ESP chooses to collocate, an LEC must allow the ESP to occupy a portion of the LEC's property for the ESP's equipment. OAR 860-35-110(4). If an ESP chooses to virtually collocate, an LEC must obtain and place equipment on the LEC's property for that particular ESP's needs. OAR 860-35-110(5), (6). Virtual collocation differs from collocation in that, when virtual collocation occurs, the LEC owns the equipment being used by the ESP; by contrast, when collocation occurs, the ESP owns the equipment that is placed on the LEC's property. The ONA provides that the LEC is to be reimbursed for both collocation and virtual collocation. OAR 860-35-040; OAR 860-350-060. GTE challenges only the rules regarding collocation. GTE does not challenge the rules regarding virtual collocation or the adequacy of the compensatory aspect of the ONA.

GTE argues that the PUC lacked the statutory authority to promulgate the rules regarding collocation because, according to GTE, they constitute a physical invasion, and thus a taking under Article I, section 18, of the Oregon Constitution, and the Fifth and Fourteenth Amendments to the Constitution of the United

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[2] "Collocation" is defined by OAR 860-35-020(8), quoted in the text above.

"Virtual collocation" is defined by OAR 860-35-020(27) as

> "a service, offered by a LEC, which provides for placement and installation of customer selected equipment, software, and databases on LEC premises. Premises include central offices, remote network facilities, or any other similar location owned by the LEC. The equipment, software, and databases are owned and maintained by the LEC."

States.[3] From that premise, GTE then argues that, because the PUC lacks the *express* eminent domain authority that is required before an agency may effect a taking, the rules are beyond the PUC's statutory authority, no matter how much compensation would be paid under them.

GTE brought a challenge to the collocation rules in the Court of Appeals under ORS 183.400. The Court of Appeals concluded that the challenged rules did not effect a taking and, thus, held that those rules were valid. *GTE Northwest, Inc. v. Public Utility Commission*, 130 Or App 637, 645, 883 P2d 255 (1994). For the reasons that follow, we reverse.

II. JUDICIAL REVIEW UNDER ORS 183.400

This case involves judicial review of an agency's rule under ORS 183.400, quoted *ante* at note 1. Under ORS 183.400, the appellate court may declare a rule invalid if (1) the rule was adopted without compliance with applicable statutory procedures, (2) the rule exceeds the statutory authority of the agency, or (3) the rule violates a constitutional provision. ORS 183.400(4). ORS 183.400(3) provides:

> "Judicial review of a rule shall be limited to an examination of:

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[3] Article I, section 18, of the Oregon Constitution, provides in part:

> "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation * * *."

The Fifth Amendment to the Constitution of the United States provides in part:

> "[N]or shall private property be taken for public use, without just compensation."

The Takings Clause of the Fifth Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Nollan v. California Coastal Comm'n*, 483 US 825, 827, 107 S Ct 3141, 97 L Ed 2d 677 (1987).

"(a) The rule under review;

"(b) The statutory provisions authorizing the rule;

"(c) Copies of all documents necessary to demonstrate compliance with applicable rulemaking procedures."

Judicial review of an agency's rule under ORS 183.400 is limited to a determination of whether the rule, as written, is valid:

> "We emphasize at the outset the limited scope of the Court of Appeals' review (and ours) under ORS 183.400. Aside from questions that might arise concerning the facts surrounding the process of adopting a rule—questions not raised in this case—judicial review under ORS 183.400 is limited to the face of the rule and the law pertinent to it. Numerous individual fact situations can arise under any rule, but judicial review of the rule as applied to each of those situations is reserved to other forums. ORS 183.400(1). *See, e.g.*, ORS 183.482, ORS 183.484 (providing for judicial review of agency orders in various fact-specific situations). Petitioners' petition for review in this case refers to actions alleged to be occurring pursuant to the rules at issue here, but the legality of any particular application of the rules is premature, and not subject to review under ORS 183.400." *AFSCME Local 2623 v. Dept. of Corrections*, 315 Or 74, 79, 843 P2d 409 (1992).

In *AFSCME*, this court considered an ORS 183.400 challenge to a rule adopted by the Department of Corrections. That rule provided that an employee or volunteer could be asked to submit to a search "only when there is reasonable suspicion that the employee or volunteer is in possession of unauthorized property or contraband and that the search and seizure is necessary to substantiate the suspected violation." OAR 291-41-030(1). This court considered the petitioners' arguments concerning whether the Department had statutory authority to adopt rules that allowed

such searches even when, as in this case, the rule applied only under certain built-in conditions precedent. *Id.* at 79–82. The court held that the challenged rules did not exceed the agency's statutory authority. *Id.* at 81–82. What was not subject to review was simply "actions alleged to be occurring pursuant to the rules at issue." *Id.* at 79.

As noted above, GTE challenges the portions of the PUC's rules that authorize collocation. OAR 860-35-110 requires an LEC to provide for collocation if certain conditions are satisfied. OAR 860-35-110(4)(e) provides in part:

> "In the event a[n] LEC states it does not have sufficient space to allow for collocation and the [ESP] disputes the LEC's assertion, the [PUC's] staff shall inspect the proposed point of collocation to verify that there is a lack of space. If the [PUC's] staff verifies that space is not available, the LEC shall deny collocation to the customer and offer the customer virtual collocation * * *."

The provision regarding insufficient space does not represent an application of the collocation rules in a particular fact situation, which would not be within our scope of review under *AFSCME*; rather, it is part of the rule itself. The rule, by its terms, requires collocation when, among other things, there is enough space. The question, then, is not whether the rule always requires collocation, but rather whether every collocation constitutes a taking. The exception to collocation for insufficient space is simply a built-in condition precedent to the application of the challenged rule, like reasonable suspicion in *AFSCME*. GTE does not challenge any "actions alleged to be occurring

pursuant to the rules at issue," which *AFSCME* holds would be beyond our scope of review.[4]

Accordingly, review of the challenged rules is appropriate under ORS 183.400. GTE argues specifically that collocation is a taking and that the authorization of a taking exceeds the PUC's statutory authority, ORS 183.400(4)(b). Under that provision, we must "decide whether the promulgation of the regulation was within the jurisdictional authority of [the PUC]." *See Gilliam County v. Dept. of Environmental Quality*, 316 Or 99, 106, 849 P2d 500 (1993) (stating quoted standard), *rev'd on other grounds sub nom Oregon Waste Systems v. Dept. of Env. Quality*, ___ US ___, 114 S Ct 1345, 128 L Ed 2d 13 (1994).

Gilliam County and *AFSCME* instruct us first to consider the jurisdictional authority of the agency, by looking at the face of the rule and the law pertinent to it. We thus turn to whether the PUC has the authority to promulgate rules that affect a taking within the meaning of the Oregon Constitution. It is logical to begin with that inquiry because, if the PUC has the power to promulgate rules that effect a taking, it matters not whether the underlying premise of GTE's argument (that the challenged rules effect a taking) is correct, and we would need to proceed no further.

III. AGENCY'S AUTHORITY TO EFFECT A TAKING

GTE argues that the PUC is without authority to engage in acts, including rulemaking, that effect a taking. GTE's argument is premised on the assertion that *express* eminent domain authority is required before a state agency may take property for a public purpose. GTE is correct.

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[4] To the extent that the present case is methodologically inconsistent with *AFSCME*, hereafter we will follow the analysis provided here.

"Eminent domain is the power inherent in a sovereign state of taking or of authorizing the taking of any property within its jurisdiction for a public use or benefit." *Dept. of Trans. v. Lundberg*, 312 Or 568, 571 n 1, 825 P2d 641 (internal quotation marks omitted; citation omitted), *cert den* ___ US ___, 113 S Ct 467, 121 L Ed 2d 374 (1992). This court has repeatedly and consistently held that "the right of eminent domain * * * can be exercised only by legislative authority." *B.V.L. Co. v. Johnson*, 30 Or 205, 208, 46 P 790 (1896). The legislature may delegate its power of eminent domain to an administrative agency, but it must do so expressly.

> "Eminent domain is vested in the state. This power may be delegated by it to its *subordinate agencies*, but he who would exercise such sovereign right of taking another person's property * * * *must be able to point out express statutory authority. It will not be implied*[.]" *Smith v. Cameron et al.*, 123 Or 501, 504, 262 P 946 (1928) (Emphasis added).

See also Emerald PUD v. PP&L, 302 Or 256, 263, 729 P2d 552 (1986) (concluding that a state agency had the power to act in eminent domain when the statute "clearly" granted that power to the agency); *Tomasek v. Oregon Highway Com'n*, 196 Or 120, 142, 248 P2d 703 (1952) ("Though the power of eminent domain is inherent in the state, it lies dormant until called into existence by *express legislative authority*.") (emphasis added); *State ex rel. v. Hawk et al.*, 105 Or 319 325, 327, 208 P 709 (1922) ("The power of eminent domain is inherent in the state, yet it lies dormant until called into exercise by *express legislative authority*[.] * * * [S]tatutes providing for condemnation should be strictly construed." (emphasis added)).

The PUC does not disagree with the foregoing principle. Rather, the PUC argues for a limitation on its application:

> "The requirement of eminent domain power exists to protect public funds from being used to buy property by agencies that have no authorization to purchase it."

The PUC asserts that that policy concern is not invoked by the collocation rules, because under those rules there

> "is no fiscal exposure to PUC, nor is there any other risk to public funds. * * * The regulatory structure * * * not only provides compensation, it provides for judicial review to determine whether that compensation is adequate and fair. In short, compensation for the collocation services that a[n] LEC may be required to provide is built into the rates paid by the collocators." (Citations omitted.)

The PUC's argument is that, when a government agency acts in eminent domain and takes private property for public use, but when compensation for that taking does not come directly from the public treasury, the agency needs no specific grant of authority so to act.

The PUC points to no cases from this jurisdiction, nor are we aware of any, that support that view. The PUC's argument reads into this court's prior cases a rationale and, thereby, a limitation, that those cases do not contain. The cases cited above establish a bright-line rule: that an agency may not act in eminent domain without an express grant of power from the legislature. It is up to the legislature, not the PUC or any other administrative agency, to determine how those powers should be exercised. The legislature's reasons for granting or refusing to grant an administrative agency the power to act in eminent domain may include a desire to refrain from depleting the public fisc. However, the legislature's decision may also be rooted in a number of other policy considerations.

In the alternative, the PUC argues that the legislature has expressly given it the necessary eminent domain authority over

telecommunications providers. It cites ORS 183.335, 756.060, and ORS chapter 759. ORS 183.335 concerns the notice that an agency must give prior to rulemaking. ORS 756.060 contains a general grant of rulemaking authority to the PUC. ORS chapter 759 delineates the authority and powers of the PUC. Although sections of that chapter do give the PUC broad regulatory and rulemaking authority, *see, e.g.*, ORS 759.580 (authorizing the PUC to require telecommunications utilities to offer services to a locality not already served), no section of that chapter contains an express grant of authority to the PUC to act in eminent domain generally or in regard to an LEC's property.[5]

In summary, the power of eminent domain may be exercised by an agency only if the agency has express statutory authority. The PUC does not have express statutory authority to promulgate rules that would effect a taking of an LEC's facilities. Accordingly, we next consider whether the challenged collocation rules do, in fact, effect a taking.

IV. TAKINGS ANALYSIS

GTE argues that collocation is a physical invasion and, thus, a taking under the holding of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419, 102 S Ct 3164, 73 L Ed 2d 868 (1982).[6] For the following reasons, we agree.

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[5]The legislature has granted the PUC the power to act in eminent domain in circumstances not presented here. The PUC can condemn property along public roads within the corporate limits of any municipal corporation for the location of telephone lines and telephone poles. ORS 759.080. The PUC does not contend that ORS 759.080 provides authority for the challenged rules.

[6] *Loretto* was decided under the federal constitution. GTE offers no separate analysis under the state constitution. Accordingly, we assume, without deciding, that the analysis is the same under Article I, section 18, of the Oregon Constitution, and the Takings Clause of the Fifth Amendment of the Constitution of the United States. *See Dept. of Trans. v. Lundberg*, 312 Or

(continued...)

In *Loretto*, a property owner challenged a New York statute that prohibited the property owner from interfering with cable television facilities installed on her property. That statute also prohibited the property owner from demanding payment from any tenant or cable television company for the use of those facilities, except for a one-time, one dollar payment. 458 US at 421–25. The Court held that the challenged statute, as applied to the property owner in *Loretto*, constituted a taking. *Id.*, at 441.

The Court started its analysis by noting that it has no standard formula for determining when governmental interference with property constitutes a taking. *Id.* at 426. The Court stated, however, that a "'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government." *Ibid.* The Court concluded that, "when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred." *Ibid.* If the nature of the governmental intrusion amounts to a "permanent physical occupation of property," the inquiry ends, regardless of "whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 434–45.

The Court in *Loretto* did not engage in a detailed discussion of what constituted a physical invasion. The Court resolved the question before it by stating that the

> "placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute. Once the fact of occupation is shown, of course, a court should consider the *extent* of the occupation as one relevant factor in determining the compensation due. For

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[6](...continued)

568, 572 n 4, 825 P2d 624 (stating that principle), *cert den* ___ US ___, 113 S Ct 467, 121 L Ed 2d 374 (1992).

> that reason, moreover, there is less need to consider the extent of the occupation in determining whether there is a taking in the first instance." *Id.* at 437–38 (emphasis in original; footnote omitted).

In that case, the cable television facilities on the property owner's property "involved a direct physical attachment" to the property. *Id.* at 438. It was, therefore, a physical invasion.

In *Loretto*, the Court explicitly rejected the argument that, because the challenged statute applied only to rental property, "the law is simply a permissible regulation of the use of real property." *Id.* at 439. "So long as the property remains residential and a [cable television] company wishes to retain the installation, the landlord must permit it." *Ibid.* The Court noted, in particular, that if the challenged statute

> "required landlords to provide cable installation if a tenant so desires, the statute might present a different question from the question before us, since the landlord would own the installation. *Ownership would give the landlord rights to the placement, manner, use, and possibly the disposition of the installation. The fact of ownership is * * * not simply incidental; it would give a landlord (rather than a [cable television] company) full authority over the installation except only as government specifically limited that authority.*" *Id.* at 440 n 19 (internal question marks omitted; citation omitted; emphasis added).

In *FCC v. Florida Power Corp.*, 480 US 245, 107 S Ct 1107, 94 L Ed 2d 282, (1987), the Court clarified its holding in *Loretto*. In *Florida Power*, a utility company challenged a decision of the Federal Communications Commission (FCC), made under a federal statute, which regulated the rates that the utility company could charge to cable television companies for running television cables on the utility company's poles. 480 US

at 247–50. The Court rejected the argument that the rate regulations constituted a permanent physical invasion and that *Loretto* applied to the facts in *Florida Power*. *Id.* at 250. The Court distinguished the facts in *Florida Power* from the facts in *Loretto* as follows:

> "[W]hile the statute we considered in *Loretto* specifically *required* landlords to permit permanent occupation of their property by cable companies, nothing in the [federal statute] as interpreted by the FCC in these cases gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into * * * agreements with cable operators. The [federal statute] authorizes the FCC * * * to review the rents charged by public utility landlords who have voluntarily entered into leases with cable company tenants renting space on utility poles. As we observed in *Loretto*, statutes regulating the economic relations of landlords and tenants are not *per se* takings. 'So long as these regulations do not *require* the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to non-possessory governmental activity.' *Loretto, supra*, at 440 (emphasis added).
>
> "This element of required acquiescence is at the heart of the concept of occupation. As we said in *Loretto*:
>
> > "'[P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. Furthermore, such an occupation is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the

> timing, extent, or nature of the invasion.' 458 US, at 436 (citation omitted).
>
> "Appellees contend, in essence, that it is a taking under *Loretto* for a tenant invited to lease at a rent of $7.15 to remain at the regulated rent of $1.79. But it is the invitation, not the rent, that makes the difference. The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license." 480 US at 251–253 (emphasis in original; footnote omitted; some citations omitted).

Recently, in *Yee v. Escondido*, 503 US 519, 112 S Ct 1522, 118 L Ed 2d 153 (1992), the Court further clarified what constitutes a physical invasion. In *Yee*, owners of a mobile home park challenged a rent control ordinance, arguing that the ordinance was a physical invasion and, thus, a taking. The owners objected to certain provisions in the ordinance that prevented them from determining to whom they could rent and how much they could charge their tenants. 503 US at 526–27. They argued that the challenged ordinance "has transferred a discrete interest in land—the right to occupy the land indefinitely at a sub-market rent—from the park owner to the mobile home owner." *Id.* at 527. The owners saw that interest as "no less than a right of physical occupation of the park owner's land." *Ibid.*

The Supreme Court rejected that argument:

> "The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land. * * * Thus whether the government floods a landowner's property or does no more than require the landowner to suffer the installation of a cable, the Takings Clause requires compensation if the government authorizes a compelled physical invasion of property." *Ibid.* (emphasis in original; citations omitted).

The Court then noted that, in *Yee*, the owners were not compelled,

> "once they have rented their property to tenants, to continue doing so. * * * [The statute] provides that a park owner who wishes to change the use of his land may evict his tenants, albeit with six or twelve months notice. Put bluntly, no government has required any physical invasion of petitions' property. *Petitioners' tenants were invited by petitioners, not forced upon them by the government.*" *Id.* at 527-28 (citation omitted; emphasis added).

The Court explicitly stated that a "*different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy.*" *Id.* at 528 (emphasis added). The Court repeatedly emphasized that distinction. *See id.* at 531 ("Because [the owners of the mobile home park] voluntarily open their property to occupation by others, petitioners cannot assert a *per se* right to compensation based on their inability to exclude particular individuals"); *Id.* at 532 (quoting *Florida Power*, 480 US at 252, "'it is the invitation, not the rent, that makes the difference'").

In the present case, collection "can be characterized as a physical invasion by [the] government," *Loretto*, 458 US at 426, for three reasons. First, collocation by definition involves the "installation of a[n ESP's] equipment, software, and databases on LEC premises." OAR 860-35-020(8). That is, by definition, collocation involves the "placement of a fixed structure on [the] land or real property" of an LEC. *Loretto*, 458 US at 437. Under the collocation rules, an LEC is required to accept a "direct physical attachment" to the property. *Id.* at 438. A "direct physical attachment," under *Loretto*, constitutes a physical invasion.

The second reason why collocation constitutes a physical invasion is that, under the rules, it is the ESP, not the LEC, that owns the equipment placed on the LEC's property. OAR 860-35-020(8) provides that, in collocation, "the equipment, software, and databases are owned by the [ESP]." As discussed above, the Court in *Loretto* relied on whether the property owner, or a third party, owned the cable boxes in deciding whether a physical invasion had occurred. The Court indicated that the outcome in *Loretto* might have been different had Loretto, and not the cable television company, owned the cable boxes. *See Loretto*, 458 US at 440 n 19 ("[t]he fact of ownership is * * * not simply incidental") (internal quotation marks omitted; citation omitted).

The third reason why collocation constitutes a physical invasion is that the rules *require* an LEC to provide collocation to an ESP that requests collocation. OAR 860-35-110(4)(a) provides that LECs "*shall* permit [an ESP] to collocate" if the ESP "has complied with all collocation requirements specified in [OAR ch 860, division 35]." (Emphasis added.) *See also* OAR 860-35-070(5)(b) (providing that "[t]he LEC shall implement [a request for collocation] as soon as feasible and in any event no later than six months of the receipt of the request"). Our discussion of *Florida Power* and *Yee* demonstrate that, when a statute *requires* a property owner "to suffer the physical occupation of a portion of his building by a third party," a physical invasion has occurred. "This element of required acquiescence is at the heart of the concept of occupation." *Florida Power*, 480 US at 252. Collocation thus makes ESPs that receive collocation "interloper[s] with * * * government license[s]," rather than "commercial lessee[s]." *Id.* at 253.

The Court of Appeals concluded that, even if collocation constitutes a physical invasion, that invasion "in this case is not

'permanent' within the meaning of *Loretto*, because the LECs have some control over the extent and duration of the occupation." 130 Or App at 644. The Court of Appeals concluded that the invasion constituted a "temporary" taking. *Ibid.* That argument misreads the Supreme Court's "physical invasion" jurisprudence. The *duration* of the "taking" by physical invasion is not relevant to the determination of whether a "taking" has occurred.

In determining the scope of the PUC's authority in this case, the issue is not whether the taking is permanent or temporary. Rather, the issue is whether the PUC has the authority, in this instance, to promulgate rules that effect any taking at all. As already noted, the PUC lacks that authority.

The PUC next argues that, even if the collocation rules effect a physical invasion, *Loretto* is not applicable to the facts of this case for two reasons. First, the PUC asserts that the interest allegedly taken is not one that the property owner had in the first place. The PUC reasons that, because LECs lack the power to exclude the PUC from their property, *see* ORS 756.075 (providing that the PUC or its representatives may enter any premises or facilities occupied by any public utility to make any inspection, examination or test reasonably required by the PUC to carry out its public duties), and because public utilities are restrained in how they make use of their property, *see* ORS 759.375 (providing that public utilities cannot sell or otherwise dispose of assets used to serve the public without first obtaining the PUC's approval), LECs lack a "historically rooted expectation of compensation." The PUC reasons that, because of those restraints, LECs never had the right to exclude the PUC occupier in the first place and, therefore, the occupation is not a taking.

The PUC's argument is inconsistent with *Loretto*. There, the Court stated:

> "This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails. *In none of these cases, however, did the government authorize the permanent occupation of the landlord's property by a third party*. Consequently, our holding today in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building. *So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party*, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity." 458 US at 440 (citations omitted; footnote omitted; emphasis added).

In other words, the facts that an industry is heavily regulated, and that a property owner acquired the property knowing that it is heavily regulated, do not diminish a physical invasion to something less than a taking. Additionally, the fact that government itself regulates the industry, and therefore invades some of the property owner's traditional property rights, does not permit the government to allow a physical invasion by a third party.[7]

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[7] In another passage in *Loretto*, the Court stated:

> "Moreover, an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property. * * * [P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. Furthermore, such an occupation is qualitatively more

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The PUC also argues that it could prevent GTE and other LECs from placing their own enhanced service equipment in their basic service plants, if that were necessary to promote viable competition between LECs and ESPs.[8] From that premise, the PUC concludes that it may, as a condition of permitting an LEC to locate its own enhanced service equipment in its network, require an LEC to permit competitors to locate there as well. That is, the PUC argues that, when the state has the power to forbid a particular use of property, it may, as the price of permitting that use, require the owner to submit to *a physical invasion* of that property as long as there is a substantial nexus between the governmental purpose and the invasion.

In support of that argument, the PUC relies on *Nollan v. California Coastal Comm'n*, 483 US 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987). In *Nollan*, the California Coastal Commission

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[7](...continued)

severe than a regulation of *use of* property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion." 458 US at 436 (emphasis in original; citations omitted).

In that passage, the Court reasserts that a third party's invasion of a property owner's property is of special significance in determining whether a physical invasion has occurred.

[8] PUC cites ORS 759.015 in support of that proposition. That statute provides:

> "The Legislative Assembly finds and declares that it is the goal of the State of Oregon to secure and maintain high-quality universal telecommunications service at just and reasonable rates for all classes of customers and to encourage innovation within the industry by a balanced program of regulation and competition. The commission shall administer the statutes with respect to telecommunications rates and services in accordance with this policy."

We assume, without deciding, that that statute grants to the PUC the power to prohibit LECs from placing their own enhanced service equipment in their basic service plants.

required a beach front property owner to give the public access to the dry sand area of beach bordering the property, in exchange for the right to build a house that would block the view of that beach to passersby. Thus, the state attempted to regulate the Nollans' use of their property and to condition the receipt of a building permit on compliance with those regulations. 483 US at 827–31. The California Coastal Commission defended its action on the ground that, along with other houses built along the shore, the new house would interfere with visual access to the beach and create a "psychological barrier" to access. *Id.* at 838. The Commission argued that the public easement it decreed would provide "lateral access." *Ibid.*

The Court rejected the Commission's argument, because there was no rational nexus between the harm the Commission found, lack of visual access, and the relief it ordered, physical access along the beach. In reaching that conclusion, the Court made the following statement, on which the PUC relies:

> "The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree. Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the house * * * so long as the Commission could have exercised its police power (as we assume it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." *Id.* at 836.

The PUC errs by seeking to apply *Nollan's* "regulatory takings" analysis to a "physical invasion" case. The two are quite different. In *Yee*, the court explained the distinction as follows:

> "Most of our cases interpreting the [Takings] Clause fall within two distinct classes. Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation. See, *e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). But where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. The first category of cases requires the courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions." 503 US at 522 (citation omitted).

The present case involves the state's direction to the landowner to permit placement of a third party's property on the property of the landowner. The Supreme Court's takings cases clearly distinguish between physical invasions and regulations; the PUC cites the inapplicable line of regulation-related cases.

The PUC's attempts to distinguish *Loretto* are not convincing. The challenged collocation rules effect a taking under *Loretto*.

CONCLUSION

The challenged collocation rules promulgated by the PUC would effect a taking. The PUC lacks authority to make rules that effect a taking. Accordingly, the PUC exceeded its statutory authority when it promulgated those rules. Pursuant to ORS 183.400(4)(b), we declare those rules to be invalid.

The decision of the Court of Appeals is reversed. OAR 860-35-020(8), OAR 860-35-070(5), and OAR 860-35-110 are invalid insofar as they provide for collocation by an enhanced service provider on a local exchange carrier's property.

APPENDIX

OAR 860-35-070(5) provides:

"Complete requests for collocation and virtual collocation shall be evaluated pursuant to the following requirements:

"(a) The LEC shall provide a written response to the customer within 45 days of receipt;

"(b) The LEC shall implement the request as soon as feasible and in any event no longer than six months of the receipt of the request;

"(c) The LEC shall implement a request for collocation or virtual collocation by offering the service in tariffs or by special contract if there is sufficient space or capacity and all applicable requirements in OAR 860-35-080(5) and 860-35-110 are met."

OAR 860-35-110 provides in part:

"(1) LECs shall offer collocation and virtual collocation to customers as provided in this rule.

"(2) Software and database collocation shall be limited to facilities designed for external applications such as rapid delivery platforms, service nodes, or memory partitions. All requirements for software and database collocation must be approved by the Commission unless there is mutual agreement for such collocation between the LEC and the requesting customer.

"(3) A LEC shall require customers to meet the following collocation requirements:

"(a) Collocation space shall not be accessible by the general public. Customers shall comply with all reasonable security requirements of the LEC. Customers shall permit LEC personnel to enter and inspect collocation space upon 24 hour notice, and only in the presence of a customer representative, except that LEC personnel may immediately enter in the event of an emergency;

"(b) Customers shall be responsible for the installation, operation, and maintenance of its own equipment. LECs may offer installation, operation, and maintenance services to customers. Equipment compatibility shall be the responsibility of the customer.

"(c) Customers are required to maintain comprehensive general liability insurance, including protection against death, personal injury and property damage, issued by a company qualified to do business in Oregon, in an amount of not less than $1 million;

"(d) Customers are required to indemnify the LEC in the event there is damage to LEC equipment or the LEC's security is compromised as a result of the customer's intentional misuse or negligence;

"(e) Customers shall request collocation in writing. The request shall specify technical and space requirements.

"(4) LECs shall meet the following collocation requirements;

"(a) If a customer has complied with all collocation requirements specified in this Division, the LEC shall permit the customer to collocate without regard to the technology employed by the customer;

"(b) A LEC shall maintain and control access to its facilities in accordance with industry standards for security and safety. A LEC shall permit access to a customer's collocated facilities by authorized representatives of the customer in accordance with said standards;

"(c) A LEC shall be required to indemnify the collocated customer against death, personal injury and property damage caused by the LEC's intentional misuse or negligence;

"(d) A LEC shall assign space for collocation on a first-come, first-served basis based on the date the LEC

receives a collocation request. The LEC shall maintain records documenting requests for collocation;

"(e) In the event a LEC states it does not have sufficient space to allow for collocation and the customer disputes the LEC's assertion, the Commission's staff shall inspect the proposed point of collocation to verify that there is a lack of space. If the Commission's staff verifies that space is not available, the LEC shall deny collocation to the customer and offer the customer virtual collocation and CEI arrangements;

"(f) Expansion of the LEC's enhanced services operation shall not take precedence over existing written requests for collocation. In the event a LEC requires space for basic services which is otherwise occupied by a customer, the LEC shall give the customer at least 12 months' written notice to vacate. Customers shall vacate on a last-in, first-out basis or as mutually agreed by all affected parties. Customers so forced to vacate shall be offered virtual collocation and CEI arrangements.

"(g) In the event it is necessary for a LEC to construct or modify existing space to collocate a customer, the LEC may require the customer to pay reasonable construction costs for the construction of segregated space in a LEC facility. Therefore, the LEC may charge a monthly service charge for the use of the segregated space;

"(h) LECs shall permit customers to monitor, test, and control the customer's collocated equipment either on site or remotely;

"(i) LECs shall permit a customer to transmit information, including signaling and protocols, through the LEC's network without interference or manipulation;

"(j) To the extent that a LEC provides enhanced services by means of computer software operating in a processor external to its central office switches, the LEC

shall make available to customers the same interfaces which the LEC uses to enable communications between its switches and such external processor."

APPENDIX B

GTE NORTHWEST INCORPORATED,
Petitioner,
v.
PUBLIC UTILITY COMMISSION
OF OREGON,
Respondent,
and
MCI TELECOMMUNICATIONS
CORPORATION,
Intervenor-Respondent.
(93-852; CA A81647)

Judicial Review of Administrative Rules.

Richard E. Potter argued the cause for petitioner. With him on the brief were Timothy J. O'Connell, James M. Brown and Enfield, Guimond, Brown & Collins.

Robert M. Atkinson, Assistant Attorney General, argued the cause for respondent. With him on the brief were Theodore R. Kulongoski, Attorney General, Virginia L. Linder, Solicitor General, and Keith L. Kutler, Assistant Attorney General.

No appearance for intervenor-respondent MCI Telecommunications Corporation.

Before Warren, Presiding Judge, and Edmonds and Leeson, Judges.

EDMONDS, J.

Rules held valid.

EDMONDS, J.

GTE Northwest, Inc. (GTE), challenges, under ORS 183.400, certain rules of the Public Utility Commission (PUC), adopted by Order No. 93-852,[1] requiring local telephone

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[1] The challenged rules are OAR 860-35-020(8), OAR 860-35-070(5) and OAR 860-35-110.

OAR 860-35-020(8) provides:

> "'Collocation' means a service, offered by a LEC, which provides for placement and installation of a customer's equipment, software, and databases on LEC premises. Premises include central offices, remote network facilities, or any other similar location owned by the LEC. The equipment, software, and databases are owned by the customer."

OAR 860-35-070(5) provides:

> "Complete requests for collocation and virtual collocation shall be evaluated pursuant to the following requirements:
>
> "(a) The LEC shall provide a written response to the customer within 45 days of receipt;
>
> "(b) The LEC shall implement the request as soon as feasible and in any event no longer than six months of the receipt of the request;
>
> "(c) The LEC shall implement a request for collocation or virtual collocation by offering the service in tariffs or by special contract if there is sufficient space or capacity and all applicable requirements in OAR 860-35-080(5) and 860-35-110 are met."

OAR 860-35-110 provides, in part:

> "(1) LECs shall offer collocation and virtual collocation to customers as provided in this rule.
>
> "(2) Software and database collocation shall be limited to facilities designed for external applications such as rapid delivery platforms, service nodes, or memory partitions. All requirements for software and database collocation must be approved by the Commission unless there is mutual agreement for such collocation between the LEC and the requesting customer.
>
> "(3) A LEC shall require customers to meet the following collocation requirements:

(continued...)

[1](...continued)

"(a) Collocation space shall not be accessible by the general public. Customers shall comply with all reasonable security requirements of the LEC. Customers shall permit LEC personnel to enter and inspect collocation space upon 24 hour notice, and only in the presence of a customer representative, except that LEC personnel may immediately enter in the event of an emergency;

"(b) Customers shall be responsible for the installation, operation, and maintenance of its own equipment. LECs may offer installation, operation, and maintenance services to customers. Equipment compatibility shall be the responsibility of the customer.

"(c) Customers are required to maintain comprehensive general liability insurance, including protection against death, personal injury and property damage, issued by a company qualified to do business in Oregon, in an amount of not less than $1 million;

"(d) Customers are required to indemnify the LEC in the event there is damage to LEC equipment or the LEC's security is compromised as a result of the customer's intentional misuse or negligence;

"(e) Customers shall request collocation in writing. The request shall specify technical and space requirements.

"(4) LECs shall meet the following collocation requirements;

"(a) If a customer has complied with all collocation requirements specified in this Division, the LEC shall permit the customer to collocate without regard to the technology employed by the customer;

"(b) A LEC shall maintain and control access to its facilities in accordance with industry standards for security and safety. A LEC shall permit access to a customer's collocated facilities by authorized representatives of the customer in accordance with said standards;

"(c) A LEC shall be required to indemnify the collocated customer against death, personal injury and property damage caused by the LEC's intentional misuse or negligence;

"(d) A LEC shall assign space for collocation on a first-come, first-served basis based on the date the LEC receives a collocation request. The LEC shall maintain records documenting requests for collocation;

"(e) In the event a LEC states it does not have sufficient space to allow for collocation and the customer disputes the LEC's assertion, the

(continued...)

exchange companies (LECs) to offer "collocation" to enhanced service providers (ESPs) located in their areas. We hold that the rules are valid.

The order in question adopted a regulatory framework known as Open Network Architecture (ONA). The order states that the adopted rules

> "advanced two main policy goals: (1) to obtain efficient delivery of enhanced telecommunications services to the public, and (2) to achieve greater competitive equity between providers of telecommunications service."

ONA is concerned with two particular competitors, LECs and their ESP "customers."[2] For purposes of this case, GTE is an LEC. An LEC provides basic telecommunications services to its area, and can also provide "enhanced services" such as call

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[1](...continued)

Commission's staff shall inspect the proposed point of collocation to verify that there is a lack of space. If the Commission's staff verifies that space is not available, the LEC shall deny collocation to the customer and offer the customer virtual collocation and CEI arrangements;

"(f) Expansion of the LEC's enhanced services operation shall not take precedence over existing written requests for collocation. In the event a LEC requires space for basic services which is otherwise occupied by a customer, the LEC shall give the customer at least 12 months' written notice to vacate. Customers shall vacate on a last-in, first-out basis or as mutually agreed by all affected parties. Customers so forced to vacate shall be offered virtual collocation and CEI arrangements.

"(g) In the event it is necessary for a LEC to construct or modify existing space to collocate a customer, the LEC may require the customer to pay reasonable construction costs for the construction of segregated space in a LEC facility. Therefore, the LEC may charge a monthly service charge for the use of the segregated space[.]"

[2] OAR 860-35-020(11) defines customer as "a subscriber, user, or consumer of LEC services or an applicant for LEC services."

forwarding or voice messaging. ESPs provide only enhanced services and must utilize the LEC's network to do so. In order to "achieve greater competitive equity" in the enhanced services market, the ONA requires LECs to allow each ESP to occupy a portion of the LEC's property for the ESP's equipment. This act is defined as "collocation" under OAR 860-35-110. An ESP may, in the alternative, request the LEC to obtain and place equipment on its premises for that particular ESP's needs. This act is called "virtual collocation," as defined by OAR 860-35-110, and it differs from collocation in that the LEC owns the equipment being used for the ESP. The ONA provides that the LEC is to be reimbursed for both types of collocation, and for all other ONA services, through its local exchange or interexchange tariffs. OAR 860-35-040; OAR 860-35-060.[3] On review, GTE does not challenge the rules regarding virtual collocation.

GTE argues that the rules regarding collocation effect a "taking" under Article I, section 18, of the Oregon Constitution[4]

---

[3] OAR 860-35-040(1) provides, in part:

> "Tariff nomenclature and service descriptions for ONA services shall be as consistent as possible with those adopted by the Information Industry Liaison Committee (IILC). Each LEC shall maintain a separate section of either its local exchange or interexchange access tariffs containing a listing of all intrastate ONA services offered by the LEC, or shall maintain a separate ONA tariff containing such listing. The separate ONA section or tariff shall refer to appropriate tariff sections and price lists for each ONA service and include a compatibility matrix."

OAR 860-35-060(3) provides:

> "Rates of collocation and virtual collection may include elements for safety, security, floor space, power, maintenance and other relevant costs."

[4] "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; * * *."

and under the Fifth[5] and Fourteenth Amendments to the United States Constitution, and that PUC has no statutory authority to "take" property. With regard to the "taking" issue, it makes only one argument: Collocation is a permanent physical occupation under the holding of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419, 102 S Ct 3164, 73 L Ed 2d 868 (1982), and as such, "is a taking without regard to the public interests it may serve." 458 US at 426, *See also Ferguson v. City of Mill City*, 120 Or App 210, 214, 852 P2d 205 (1993). We begin our discussion by emphasizing that GTE's petition is limited to a facial challenge of the rules under ORS 183.400 and, therefore, we limit our consideration "to the face of the rule and the law pertinent to it." *AFSCME Local 2623 v. Dept. of Corrections*, 315 Or 74, 79, 843 P2d 409 (1992).

In order to determine whether collocation constitutes a permanent physical occupation, it is instructive to examine the holding in *Loretto v. Teleprompter Manhattan CATV Corp.*, *supra*. That case arose out of a New York statute prohibiting a landlord's interference with the installation of cable television equipment[6] on her property, and the prohibition of any demand for payment by the landlord from either her tenants or the cable television company for the installation of the equipment. The statute also authorized the State Commission on Cable Television to set a reasonable fee for the cable television company to pay to the landlord for the use of her property.[7] The Court concluded

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[5] "[N]or shall private property be taken for public use, without just compensation."

[6] The equipment in *Loretto* involved cables, directional taps and large silver boxes installed along some of the cables. 458 US at 422.

[7] Whether there was just compensation was not one of the issues on appeal.

that the statute's mandate constituted a permanent physical occupation, and was therefore, a *per se* taking under the United States Constitution. 458 US at 426. *See FCC v. Florida Power Corp.*, 480 US 245, 250, 107 S Ct 1107, 94 L Ed 2d 282 (1987).

In making that determination, the Court reviewed the case law regarding "permanent physical occupation, on the one hand, and the cases involving a more temporary invasion * * * on the other." 458 US at 428. It said that cases involving a physical invasion "are special." 458 US at 432. It noted that, "[w]hen faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking." 458 US at 427. Thus, a permanent physical occupation authorized by state law constitutes a taking whether it is the state or a party authorized by the state who is the occupant. *Pumpelly v. Green Bay Co.*, 80 US (13 Wall) 166, 20 L Ed 557 (1872). A mere temporary invasion will not constitute a *per se* taking.

Although the Court in *Loretto* never clearly defines what is a permanent physical occupation, it does give examples of what it considers to be permanent invasions and temporary invasions. Examples of permanent physical invasions include the construction of a dam, which permanently flooded the owner's property, *Pumpelly v. Green Bay Co.*, *supra*, the placement of telegraph poles on the city's public streets, *St. Louis v. Western Union Telegraph Co.*, 148 US 92, 13 S Ct 485, 37 L Ed 380 (1893), and the placement of telegraph lines over a railroad's right-of-way. *Western Union Telegraph Co. v. Pennsylvania R.R. Co.*, 195 US 540, 25 S Ct 133, 49 L Ed 312 (1904).

The Court also characterized a permanent physical occupation as a "property restriction of an unusually serious nature," because it effectively destroys the traditional property rights to

possess property, exclude others from its use, and to use and to dispose of portions of one's property:

> "First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property." *Loretto v. Teleprompter Manhattan CATV Corp.*, *supra*, 458 US at 435–36. Citations omitted.)

Thus, when the owner forever loses the ability to exercise any of the above property rights, the Court considers the occupation to be permanent.

In contrast, temporary invasions include the construction of a temporary dam in a river to permit construction of a tunnel, which denied an owner access to his property, *Northern Transportation Co. v. Chicago*, 99 US 635, 25 L Ed 336 (1879), and requiring a shopping mall to allow individuals to exercise free speech and petition rights on property it held open to the public. *PruneYard Shopping Center v. Robins*, 447 US 74, 100 S Ct 2035, 64 L Ed 2d 741 (1980). In *PruneYard*, even though individuals were allowed physically to invade the owner's

property, the owner could impose reasonable time, manner and place restrictions on the free speech activities. The Court reasoned that the owner's ability to impose such restrictions made on the invasion "temporary and limited in nature." 458 US at 434. Thus, characteristics of a temporary occupation focus on the duration of the physical invasion and the owner's ability to control the extent of the invasion to some degree.

In this case, we agree with GTE that there may be a physical invasion if the rules are implemented against an LEC. The PUC requires LECs to allow a portion of their property to be used for collocation. The "placement of a fixed structure," the Court said in *Loretto*, "is an obvious fact [of physical occupation]." 458 US at 437. GTE argues that the rules effectively cause a permanent occupation. However, the occupation in this case is not "permanent" within the meaning of *Loretto*, because the LECs have some control over the extent and duration of the occupation. OAR 860-35-110(4)(f) requires the occupying ESP to vacate the space after at least 12 months' written notice, in the event that the LEC needs the space for basic services. Finally, OAR 860-35-110(4)(a) vests an LEC with some control when there is no existing space for collocation. Moreover, an LEC's ability to use its own property is not unfettered. In the abstract, no taking occurs if the interest that the utility claims is an interest it never had in the first instance. *See Northwest Gas Co. v. City of Portland*, 300 Or 291, 711 P2d 119 (1985). LECs are regulated heavily in the use of their property by the PUC.[8] *See*

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[8] For example, ORS 756.075 gives the PUC authority to enter an LEC's property for the purpose of examining the LEC's equipment and records, and to place its own equipment on the LEC's property for examination purposes. ORS 759.580 authorizes the PUC to require an LEC to use its property to provide service to a particular locality. ORS 759.375 substantial-

(continued...)

Ruckelshaus v. Monsanto Co., 467 US 986, 104 S Ct 2862, 81 L Ed 2d 815 (1984);[9] *California Housing Securities, Inc. v. U.S.*, 959 F2d 955 (Fed Cir), *cert den* ___ US __, 113 S Ct 324 (1992).[10] In that sense, the exercise of the PUC's authority to control the use of an LEC's property under its rules does not offend the traditional rights to possess property and to exclude others from the use of it. Thus, GTE's argument that the limitations on the use of its own property are unconstitutional necessarily requires a balancing of the interests between private property rights and governmental interests. As we have said, those kinds of tests are not applicable to a facial challenge made on the basis that there is a permanent physical invasion.

The ramifications of the rights that the LECs retain persuade us that the criteria required by *Loretto v. Teleprompter Manhattan CATV Corp.*, *supra*, for a permanent "taking" have not been met. Whether a "taking" occurs because of a temporary invasion

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[8](...continued)

ly limits the LEC's ability to sell, lease, assign, mortgage, encumber or otherwise dispose of its property without the PUC's approval.

[9] In *Ruckelshaus*, Monsanto was required to provide various trade secrets about chemical insecticides to the government as a predicate to being licensed to manufacture and sell the chemicals. The Court said that "such restrictions are the burdens we all must bear in exchange for 'the advantage of living and doing business in a civilized community.'" *Ruckelshaus v. Monsanto Co.*, *supra*, 467 US at 1007.

[10] In *California Housing Securities, Inc. v. U.S.*, *supra*, the Court held that the Department of Treasury's appointment of a conservator and receiver over a savings and loan institution was not a taking because the savings and loan institution did not hold the property right pivotal to the *Loretto*, holding, *i.e.*, the right to exclude. The Court found it significant that the plaintiff had never held the particular property right it complained of was taken. It had voluntarily applied for federal deposit insurance under a statute that allowed the government to appoint a receiver and conservator under certain situations. Thus, the plaintiff had no historically rooted expectation that it would be compensated for the department's action.

is not an issue we need decide in the light of petitioner's facial challenge. It follows that, the rules on their face do not violate Article I, section 18, or the Fifth and Fourteenth Amendments.[11]

In the light of this conclusion, we need not discuss GTE's other arguments.

Rules held valid.

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[11] GTE also argues that *Bell Atlantic Telephone Co. v. F.C.C.*, 24 F3d 1441 (DC Cir 1994), supports its challenge that collocation is a "taking" for which the PUC had no statutory authority to require. We disagree.

APPENDIX C

APPELLATE JUDGMENT

FILED August 24, 1995

IN THE SUPREME COURT OF THE STATE OF OREGON

GTE NORTHWEST INCORPORATED,

Petitioner on Review,

v.

PUBLIC UTILITY COMMISSION OF OREGON,

Respondent on Review,

and

MCI TELECOMMUNICATIONS CORPORATION,

Intervenor-Respondent.

(PUC 98-852; CA A81647; SC S41791)

In Banc

On review from the Court of Appeals.*

Richard E. Potter, Everett, Washington, attorney for petitioner on review.

Robert M. Atkinson, Assistant Attorney General, Salem, attorney for respondent on review.

Charles L. Best, Portland, filed a brief on behalf of *amicus curiae* U.S. West Communications, Inc.

Barbee B. Lyon and Michael M. Morgan, Portland, filed a brief on behalf of *amicus curiae* Oregon Independent Telephone Association.

Robert W. Childress, Portland, filed a memorandum on behalf of *amicus curiae* Portland General Electric Company.

Thomas H. Nelson, Portland, filed a memorandum on behalf *amicus curiae* PacifiCorp.

GRABER, J.

The decision of the Court of Appeals is reversed.

OAR 860-35-020(8), OAR 860-35-070(5), and OAR 860-35-11 are invalid insofar as they provide for collocation by an enhanced service provider on a local exchange carrier's property.

*Judicial review of administrative rules of the Public Utility Commission. 130 Or App 637, 883 P2d 225 (1994).

DESIGNATION OF PREVAILING PARTY
AND AWARD OF COSTS

Prevailing party: Petitioner on reivew

[ ] No costs allowed.

[X] Costs allowed, payable by: Respondent on review

MONEY JUDGMENT

Judgment #1

Creditor: GTE NORTHWEST INCORPORATED

Debtor: PUBLIC UTILITY COMMISSION OF OREGON

Costs: $200.00

Attorney Fees: -0- [court seal]

TOTAL: $200.00

Interest: Simple, 9% per annum, from the date of this appellate judgment.

Appellate Judgment
Effective Date: October 13, 1995

APPENDIX D

SELECTED OREGON REVISED STATUTES

756.075 Right of entry for examination of equipment, records, employees; use of findings. (1) The commission or authorized representatives may enter upon any premises, or any equipment, rolling stock or facilities operated or occupied by any public utility, telecommunications utility, railroad, air carrier or motor carrier for the purpose of making any inspection, examination or test reasonably required in the administration of ORS chapter 756, 757, 758, 759, 760, 761, 763, 764, 767 or 773 and to set up and use on such premises equipment, rolling stock or facilities any apparatus and appliances and occupy reasonable space therefor.

(2) The commission or authorized representatives shall, upon demand, have the right to inspect the books, accounts, papers, records and memoranda of any public utility, telecommunications utility, railroad, air carrier or motor carrier and to examine under oath any officer, agent or employee of such public utility, telecommunications utility, railroad, air carrier or motor carrier in relation to its business and affairs.

(3) Any person who on behalf of the commission makes demand of a public utility, telecommunications utility, railroad, air carrier or motor carrier for an examination, inspection or test shall, upon request therefor, produce a certificate under the seal of the commission showing authority to make such examination, inspection or test.

(4) Nothing in this section authorizes the commission to use any information developed thereunder for any purpose inconsistent with any statute administered by the commission or to make a disclosure thereof for other than regulatory purposes. [Formerly 757.260; 1973 c.776 §20; 1987 c.447 §80]

759.005 Definitions. (1)(a) As used in this chapter, except as provided in paragraph (b) of this subsection, "telecommunications utility" means:

(A) Any corporation, company, individual, association of individuals, or its lessees, trustees or receivers, that owns, operates, manages or controls all or a part of any plant or equipment in this state for the provision of telecommunications service, directly or indirectly to or for the public, whether or not such plant or equipment or part thereof is wholly within any town or city.

(B) Any corporation, company, individual or association of individuals, which is party to an oral or written agreement for the payment by a telecommunications utility, for service, managerial construction, engineering or financing fees, and having an affiliated interest with the telecommunications utility.

(b) As used in this chapter, "telecommunications utility" does not include:

(A) Any plant owned or operated by a municipality.

(B) Any corporation not providing intrastate telecommunications service to the public in this state, whether or not such corporation has an office in this state or has an affiliated interest with a telecommunications utility as defined in this chapter.

(C) Any person acting only as a competitive telecommunications provider.

(D) Any corporation, company, individual or association of individuals providing only telephone customer premise equipment to the public.

(2) As used in this chapter:

(a) "Competitive telecommunications provider" means a telecommunications services provider which has been classified as such by the commission pursuant to ORS 759.020.

(b) "Intrastate telecommunications service" means any telecommunications service in which the information transmitted originates and terminates within the boundaries of the State of Oregon.

(c) "Local exchange telecommunications service" means telecommunications service provided within the boundaries of exchange maps filed with and approved by the commission.

(d) "Private telecommunications network" means a system, including the construction, maintenance or operation thereof, for the provision of telecommunications service or any portion of such service, by a person for the exclusive use of that person and not for resale, directly or indirectly.

(e) "Radio common carrier" means any corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers and any town making available facilities to provide radio communications service, radio paging or cellular communications service for hire.

(f) "Shared telecommunications service" means the provision of telecommunications and information management services and equipment to a user group located in discrete premises in building complexes, campuses or high-rise buildings, by a commercial shared services provider or by a users' association, through privately owned customer premises equipment and associated data processing and information management services and includes the provision of connections to local exchange telecommunications service.

(g) "Telecommunications service" means two-way switched access and transport of voice communications but does not include:

(A) Services provided by radio common carrier.

(B) One-way transmission of television signals.

(C) Surveying.

(D) Private telecommunications networks.

(E) Communications of the customer which take place on the customer side of on-premises equipment.

(h) "Toll" means telecommunications between exchanges carried on the public switched network for which charges are made on a per-unit basis. "Toll" does not include services which are an option to flat rate local or extended area service, even though such options may include charges on a per-unit basis. [1987 c.447 §1; 1989 c.5 §15; 1991 c.326 §2]

759.015 Legislative findings. The Legislative Assembly finds and declares that it is the goal of the State of Oregon to secure and maintain high-quality universal telecommunications service at just and reasonable rates for all classes of customers and to encourage innovation within the industry by a balanced program of regulation and competition. The commission shall administer the statutes with respect to telecommunications rates and services in accordance with this policy. [Formerly 757.810]

759.275 Undue preferences and prejudices. (1) No telecommunications utility shall make or give undue or unreasonable preference or advantage to any particular person or locality, or shall subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.

(2) Any telecommunications utility violating this section is guilty of unjust discrimination. [1987 c.447 §49]

759.375 Approval required prior to sale, mortgage or disposal of operative utility property. (1) No telecommunications utility doing business in Oregon shall, without first obtaining the commission's approval of such transaction:

(a) Sell, lease, assign or otherwise dispose of the whole of the property of such telecommunications utility necessary or

useful in the performance of its duties to the public or any part thereof of a value in excess of $10,000, or sell, lease, assign or otherwise dispose of any franchise, permit or right to maintain and operate such telecommunications utility or telecommunications utility property, or perform any service as a telecommunications utility; or

(b) Mortgage or otherwise encumber the whole or any part of the property of such telecommunications utility necessary or useful in the performance of its duties to the public, including any franchise, permit or right to maintain and operate such telecommunications utility or telecommunications utility property, or perform any service as a telecommunications utility; or

(c) By any means whatsoever, directly or indirectly, merge or consolidate any of its lines, plant, system or other property whatsoever, or franchise or permit to maintain or operate any telecommunications utility property, or perform any service as a telecommunications utility, or any part thereof, with any other public utility or telecommunications utility.

(2) Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing the same is void.

(3) This section does not prohibit or invalidate the sale, lease or other disposition by any telecommunications utility of property which is not necessary or useful in the performance of its duties to the public. [1987 c.447 §41]

APPENDIX E

SELECTED OREGON ADMINISTRATIVE RULES

Purpose and Applicability

860-35-010 (1) The purpose of this division is to prescribe the Open Network Architecture (ONA) environment within the State of Oregon in order to:

(a) Stimulate enhanced services availability to the public through the local exchange network;

(b) Foster development of innovative applications for ONA services and vigorous competition among all enhanced service providers;

(c) Encourage public use of enhanced services;

(d) Create a regulatory framework which ensures non-discriminatory access to the local exchange network for all providers of enhanced services on equal rates, terms, and conditions; and

(e) Prescribe conditions under which local exchange carriers may furnish enhanced services in competition with other providers of enhanced services without undue competitive advantage.

(2) This division shall apply to all LECs operating within the State of Oregon with the following exceptions:

(a) LECs which are cooperatives, unincorporated associations, or telecommunications utilities using less than 15,000 lines in Oregon and not affiliated or under common control with any other kind of public utility providing service in Oregon are exempt from OAR 860-35-030, 040, 060(1), 070(1), 080(4), and 090(2) and (3);

(b) This division shall apply to LECs which are cooperatives or unincorporated associations only for services which are subject to regulation by the commission pursuant to ORS 759.220 and ORS 759.225.

(3) A LEC, at its discretion, may elect to offer enhanced services solely on a structurally separated basis by means of LEC affiliates. Should a LEC make such an election, the LEC shall treat the LEC affiliates as customers.

Definitions

860-35-020 For purposes of this division:

(1) "Access Element (AE)" means an unbundled component of a BSA.

(2) "Aggregate CPNI" means summarized or aggregate noncustomer specific CPNI.

(3) "Ancillary Service (ANS)" means a service, such as billing and collection service or Operations Support Systems (OSS), which is performed by a local exchange carrier to directly administer or support provision of the LEC's basic and enhanced services. ANSs do not include the provision of common administration such as human resources, accounting, purchasing, inventory control, or other similar functions.

(4) "Basic Service" means a service which provides transmission capacity for the movement of information. Basic services include data processing, computer memory or storage, switching techniques and other activities which facilitate the movement of information.

(5) "Basic Service Element (BSE)" means an optional feature or function provided by a LEC as part of basic services. An optional feature or function can also be classified as a CNS.

(6) "Basic Serving Arrangement (BSA)" means basic services provided by a LEC which link customers to and through the LEC's network.

(7) "Building Block" means an element or group of elements representing the smallest feasible level of unbundling capable of being tariffed and offered as a service.

(8) "Collocation" means a service, offered by a LEC, which provides for placement and installation of a customer's equipment, software, and databases on LEC premises. Premises include central offices, remote network facilities, or any other similar location owned by the LEC. The equipment, software, and databases are owned by the customer.

(9) "Complementary Network Service (CNS)" means an optional feature or function provided by a LEC as part of basic services. An optional feature or function can also be classified as a BSE.

(10) "Comparably Efficient Interconnection (CEI)" means the provisioning of interconnection and network functionalities to customers and the LEC's own operations under the same rates, terms, and conditions, and on an unbundled and functionally equivalent basis.

(11) "Customer" means a subscriber, user, or consumer of LEC services or an applicant for LEC services.

(12) "Customer Proprietary Network Information (CPNI)" - means individual customer data which a LEC accumulates in the course of providing basic services to the customer. CPNI includes types, quantities, and locations of services, billing amounts, repair information, calling patterns, and usage data. CPNI does not include listed name, address and telephone number, billed name, address, and telephone number, credit information, or information pertaining to enhanced or unregulated services supplied by a LEC.

(13) "Enhanced Service" means a service which employs computer processing applications that act on the format, content, code, protocol or similar aspects of the customer's transmitted information; provides the customer with additional, different, or restructured information; or involves customer interaction with

stored information. Enhanced services include but are not limited to information retrieval services, voice messaging, and protocol translation between customer equipment or software.

(14) "Enhanced Service Provider (ESP)" means a person which supplies enhanced services by using ONA services furnished by a LEC, including the enhanced services operation of a LEC and an IXC acting as an ESP. An IXC acts as an ESP only when it provides enhanced services to customers separate from its provision of basic services.

(15) "Interexchange Carrier (IXC)" means a provider of basic services, except extended area service, between local exchanges.

(16) "Joint Marketing" means the offering of enhanced and basic services by a LEC to customers either through contact initiated by the LEC or through contact initiated by the customer.

(17) "LEC Affiliate" means a person separate from the LEC which is either an affiliated interest or another company in which the LEC owns a controlling interest.

(18) "Local Exchange Carrier (LEC)" means a telecommunications utility, unincorporated association, or cooperative corporation which provides basic services within the boundaries of exchange maps filed with and approved by the Commission, and provides basic service to nearby exchanges as part of extended area service. A LEC includes its employees and individuals under contract.

(19) "Nonstructural Safeguards" means measures to prevent unjust discrimination and cross-subsidy of a LEC's enhanced service operations from the LEC's basic services operations. These measures include accounting rules, service unbundling, imputation, service deployment requirements, joint marketing, and CPNI restrictions.

(20) "Open Network Architecture (ONA) Services" means Basic Serving Arrangements, Access Elements, Basic Service Elements, Complementary Network Services, Ancillary Services, Collocation, and Virtual Collocation as defined in this division.

(21) "Operations Support Systems (OSS)" means services which support various network operation functions such as service provisioning, performance monitoring, and maintenance. OSS can be classified as an ANS.

(22) "Person" includes individuals, joint ventures, partnerships, corporations and associations, and governmental entities, or their officers, employees, agents, lessees, assignees, trustees or receivers.

(23) "Structural Safeguards" means measures to prevent unjust discrimination and cross-subsidy of a LEC's enhanced service operations from the LEC's basic services operations by employing separate personnel and facilities for enhanced services or a separate LEC Affiliate for enhanced services.

(24) "Tariff(s)" means any document on file with the Commission which specifies rates, terms, and conditions for LEC services, including price lists and special contracts.

(25) "Unbundling" means disaggregation of a service into building blocks or groups of building blocks which are offered to customers as separate services.

(26) "Unhooking" means any activity by a LEC which encourages a customer or prospective customer of an ESP to switch to the LEC's version of the same or substantially similar enhanced service at the time the ESP's customer contacts the LEC to obtain basic services which are necessary for operation of the enhanced service.

(27) "Virtual Collocation" means a service, offered by a LEC, which provides for placement and installation of customer

selected equipment, software, and databases on LEC premises. Premises include central offices, remote network facilities, or any other similar location owned by the LEC. The equipment, software, and databases are owned and maintained by the LEC.

Tariffing

860-35-040 (1) Tariff nomenclature and service descriptions for ONA services shall be as consistent as possible with those adopted by the Information Industry Liaison Committee (IILC). Each LEC shall maintain a separate section of either its local exchange or interexchange access tariffs containing a listing of all intrastate ONA services offered by the LEC, or shall maintain a separate ONA tariff containing such a listing. The separate ONA section or tariff shall refer to appropriate tariff sections and price lists for each ONA service and include a compatibility matrix. The compatibility matrix shall indicate which BSAs and AEs are compatible with each BSE, CNS, and ANS offered by the LEC.

(2) Optional features and functions may be classified by a LEC as either BSEs, CNSs, or both.

(3) ONA services shall be made available in all tariffs where applicable.

(4) When a BSA is unbundled under the provisions of 860-35-030 (7), (8) and (9) the resulting services shall be tariffed as AEs, BSEs, and CNSs.

Rates for ONA Services

860-35-060 (1) Rates for ONA services contained in a LEC's interexchange access tariffs shall bc equal to rates charged for the same ONA services when they are offered in the LEC's local exchange tariffs, unless there are regulatory policy or cost differences.

(2) Rates for ONA services shall be published in tariffs and shall be based on pricing policies determined by Commission order.

(3) Rates for collocation and virtual collocation may include elements for safety, security, floor space, power, maintenance and other relevant costs.

Collocation and Virtual Collocation

860-35-110 (1) LECs shall offer collocation and virtual collocation to customers as provided in this rule.

(2) Software and database collocation shall be limited to facilities designed for external applications such as rapid delivery platforms, service nodes, or memory partitions. All requests for software and database collocation must be approved by the Commission unless there is mutual agreement for such collocation between the LEC and the requesting customer.

(3) A LEC shall require customers to meet the following collocation requirements:

(a) Collocation space shall not be accessible by the general public. Customers shall comply with all reasonable security requirements of the LEC. Customers shall permit LEC personnel to enter and inspect collocation space upon 24 hour notice, and only in the presence of a customer representative, except that LEC personnel may immediately enter in the event of an emergency;

(b) Customers shall be responsible for the installation, operation, and maintenance of its own equipment. LECs may offer installation, operation, and maintenance services to customers. Equipment compatibility shall be the responsibility of the customer;

(c) Customers are required to maintain comprehensive general liability insurance, including protection against death personal

injury and property damage, issued by a company qualified to do business in Oregon, in an amount of not less than $1 million;

(d) Customers are required to indemnify the LEC in the event there is damage to LEC equipment or the LEC's security is compromised as a result of the customer's intentional misuse or negligence;

(e) Customers shall request collocation in writing. The request shall specify technical and space requirements.

(4) LECs shall meet the following collocation requirements:

(a) If a customer has complied with all collocation requirements specified in this Division, the LEC shall permit the customer to collocate without regard to the technology employed by the customer;

(b) A LEC shall maintain and control access to its facilities in accordance with industry standards for security and safety. A LEC shall permit access to a customer's collocated facilities by authorized representatives of the customer in accordance with said standards;

(c) A LEC shall be required to indemnify the collocated customer against death, personal injury and property damage caused by the LEC's intentional misuse or negligence;

(d) A LEC shall assign space for collocation on a first-come, first-served basis based on the date the LEC receives a collocation request. The LEC shall maintain records documenting requests for collocation;

(e) In the event a LEC states it does not have sufficient space to allow for collocation and the customer disputes the LEC's assertion, the Commission's staff shall inspect the proposed point of collocation to verify that there is a lack of space. If the Commission's staff verifies that space is not available, the LEC

shall deny collocation to the customer and offer the customer virtual collocation and CEI arrangements;

(f) Expansion of the LEC's enhanced services operation shall not take precedence over existing written requests for collocation. In the event a LEC requires space for basic services which is otherwise occupied by a customer, the LEC shall give the customer at least 12 months' written notice to vacate. Customers shall vacate on a first-in, first-out basis or as mutually agreed by all affected parties. Customers so forced to vacate shall be offered virtual collocation and CEI arrangements;

(g) In the event it is necessary for a LEC to construct or modify existing space to collocate a customer, the LEC may require the customer to pay reasonable construction costs for the construction of segregated space in a LEC facility. Thereafter, the LEC may charge a monthly service charge for the use of the segregated space;

(h) LECs shall permit customers to monitor, test, and control the customer's collocated equipment either on site or remotely;

(i) LECs shall permit a customer to transmit information, including signaling and protocols, through the LEC's network without interference or manipulation;

(j) To the extent that a LEC provides enhanced services by means of computer software operating in a processor external to its central office switches, the LEC shall make available to customers the same interfaces which the LEC uses to enable communications between its switches and such external processor.

(5) A LEC shall require customers to request virtual collocation in writing. Requests shall specify which equipment, software, and databases the customer requires.

(6) LECs shall meet the following virtual collocation requirements:

(a) A LEC shall maintain and control access to its facilities in accordance with industry standards for security and safety. A LEC shall permit access for inspection purposes by authorized representatives of the customer in accordance with said standards;

(b) A LEC shall assign space for virtual collocation on a first-come, first-served basis based on the date the LEC receives a request. The LEC shall maintain records documenting requests for virtual collocation;

(c) In the event a LEC states it does not have sufficient space to allow for virtual collocation and the customer disputes the LEC's assertion, the Commission's staff shall inspect the proposed point of virtual collocation to verify that there is a lack of space. If the Commission's staff verifies that space is not available, the LEC shall deny virtual collocation to the customer and offer the customer CEI arrangements;

(d) Expansion of the LEC's enhanced services operation shall not take precedence over existing written requests for virtual collocation. In the event a LEC requires space for basic services which is otherwise occupied by a customer, the LEC shall give the customer at least 12 months' written notice to vacate. Customers shall vacate on a last-in, first-out basis or as agreed by all affected parties. Customers so forced to vacate shall be offered CEI arrangements;

(e) In the event it is necessary for a LEC to construct or modify existing space to virtually collocate a customer, the LEC may require the customer to pay reasonable construction costs;

(f) LECs shall permit customers to monitor, test, and control the virtually collocated equipment;

(g) LECs shall permit a customer to transmit information, including signaling and protocols, through the LEC's network without interference or manipulation;

(h) To the extent that a LEC provides enhanced services by means of computer software operating in a processor external to its central office switches, the LEC shall make available to customers the same interfaces which the LEC uses to enable communications between its switches and such external processor.

(7) Disputes concerning collocation and virtual collocation are subject to the complaint process in OAR 860-35-130.